No. 81-88

Office-Supreme Court
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CLERK

In The

Supreme Court of the United States

October Term, 1980

LOCAL 394, LABORERS INTERNATIONAL UNION OF NORTH AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether a settlement agreement accepted by the Union, Region 22 of the National Labor Relations Board, and both charging parties by their attorney should have been accepted under all the circumstances as consistent with public policy and Board policy?

II. Within the context and above circumstances of an exclusive hiring hall referral system, is the National Labor Relations Board confined to determining whether discrimination has in fact been practiced?

III. Whether the National Labor Relations Board has met its statutory burden in order to support its findings that the Union violated Sections 8(b)(1)(A) and (2) of the National Labor Relations Act?

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No.

In The

Supreme Court of the United States

October Term, 1980

LOCAL 394, LABORERS INTERNATIONAL UNION OF NORTH AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Local 394, Laborers International Union of North America (hereinafter "the Union"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 7, 1981.

OPINION BELOW

There was no opinion of the Court of Appeals. The decision of the National Labor Relations Board (hereinafter "NLRB") was rendered on January 4, 1980 and reported in 247 N.L.R.B. No. 5. The decision and opinion are annexed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1981. This petition for certiorari is issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

STATUTES AND ADMINISTRATIVE PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act, as amended (6) Stat. 136, 73 Stat. 519, 29 U.S.C. §§151, *et seq.;* 8(a)(2); 8(b)(1)(A); 8(b)(2); 8(b)(7)(A); 10(b); 10(c); 203(d).

The administrative provision cited is the National Labor Relations Board: Unfair Labor Practice Manual, Sections 10124.1 and 10134.2(b).

STATEMENT OF THE CASE

This case should never have been litigated as all parties entered into a settlement agreement resolving all material issues prior to the initial hearing. The facts leading up to the settlement are as follows:

Intervenors Abdunafi and Farmer filed charges with the NLRB alleging that the Union maintained an unlawful hiring hall. After many months of investigation, negotiations between

the NLRB's Regional Office and the Union, and counsel for the charging parties, a settlement was reached whereby a detailed and revised hiring hall plan would be adopted and implemented, a notice would be posted, a settlement agreement would be executed, and the charging parties would waive back pay in this proceeding without prejudice to their right to seek back pay in any other forum. Notwithstanding the agreement, Abdunafi dishonored his agreement and withdrew from the settlement just before the date of the original hearing.

All of the relief agreed to in settlement discussions was sufficient to remedy the alleged unfair labor practices, *vis.*, reformation or adoption of a hiring hall system which satisfied the NLRB's Regional Director. The charging parties agreed to look elsewhere for any personal compensatory damages.

The Union agreed to take all necessary action to effectuate the purposes of the Act.

After the issuance of the complaint in early 1977, the general counsel made overtures to the Union to the end that the matter be settled. At the outset, the Union was advised by the counsel for the general counsel that the NLRB would not have raised the subject of settlement with it unless it had first obtained authorization to settle from the attorney for the charging party so that both counsel for general counsel and the Union could be assured that negotiations would not be in vain. Counsel for general counsel specifically advised the Union's attorney that, to that end, *the attorney for the charging parties had in writing confirmed that he had authorization to settle the case.*

There can be no question but that Abdunafi's attorney was in agreement in principle with the parameters of the settlement developed by counsel for general counsel; that is, that the hiring

hall be revised but that no back pay be granted to Abdunafi and Farmer in this particular proceeding. However, Abdunafi and Farmer, it was agreed, would not waive any other remedy they might have in other fora. Based on this representation made to the Union's attorneys on at least theree occasions by the general counsel, the former pursued delicate discussions with a reluctant client — a client who believed, rightly or wrongly, that it did not have an exclusive hiring hall at all, much less one subject to "revision."

It is critical to emphasize that during the typical give and take of negotiations, the Union's counsel was continuously assured by counsel for general counsel that, if the Union accepted the NLRB's proposed settlement, there would be no problem with Mr. Abdunafi or his attorney. Indeed, each time the region obtained another concession from the Union during negotiations, it was with a statement to the effect that "this is all we need to obtain a settlement and, without this particular item, Abdunafi will not settle."

Notwithstanding all of the above, just before the original date of hearing, Abdunafi discharged his attorney and refused to settle.

Thereafter, suit was instituted by respondent Board alleging that the petitioner violated Section 8(b)(1)(A) and (2) of the Act by referring job applicants solely on the basis of subjective, irrelevant and invidious standards. The administrative law judge found for the Board on April 9, 1979. The NLRB affirmed January 4, 1980 (247 N.L.R.B. No. 5). The District of Columbia Court of Appeals affirmed April 7, 1981 in an unpublished opinion.

REASONS FOR GRANTING THE WRIT

I.

A settlement agreement accepted by the Union, Region 22 of the NLRB, and both charging parties by their attorney should have been accepted under all the circumstances as consistent with public policy and Board policy.

After many months of investigation, negotiations between the NLRB's Regional Office and the Union, and counsel for the charging parties, a settlement was reached whereby a detailed and revised hiring hall plan would be adopted and implemented, a notice would be posted, a settlement agreement would be executed, and the charging parties would waive back pay without prejudice to seek back pay in any other forum.

The polestar of the resolution of any settlement question, unilateral or otherwise, set forth in §203(d) of the Act:

> "Final Adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and medication services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

The Board, to advance that statutory policy has provided, in Section 10124.1 of the Board's Unfair Labor Practice Manual.

"*Settlement in General*

> Policy: It is the policy of the Board and the office of the General Counsel to provide full opportunity to the parties to reach a mutually satisfactory resolution of issues as an alternative to litigation. Settlement of a meritorious case is the most effective means to improved relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action.
>
> The expenditure of funds in connection with the formal status of a case and the effect of the passage of time upon the effectiveness of the Board in accomplishing the objectives of the Act dictate that the achievement of voluntary remedial action be given high priority and that complete and diligent effort be exerted to achieve the settlement of the greatest possible number of meritorious cases."

The Board's rule reflects both its statutory and general federal policy that conciliation and voluntary settlements are the preferred means for resolving employment discrimination disputes. *United States v. Alleghany Ludlum Industries, Inc.*, 517 F. 2d 826, 846-47 (5th Cir. 1975); *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974). For it is axiomatic that termination of litigation through settlement is the judicially favored way of disposing of litigation. *Petty v. General Accident Fire and Life Assurance Corp.*, 365 F. 2d 419, 421 (3rd Cir. 1966); *Pfizer Inc. v. Lord*, 456 F. 2d 532, 543 (8th Cir. 1972), *cert. denied*, 406 U.S. 976 (1972); *See Cities Service Oil Co. v. Coleman Oil Co., Inc.*, 470 F. 2d 925, 929 (1st Cir. 1972), *cert. denied*, 411 U.S. 967 (1972); *Autera v. Robinson*, 419 F. 2d 1197, 1199 (C.A.D.C. 1969).

All of the relief agreed to in settlement discussions was sufficient to remedy the alleged unfair labor practices, *viz.*, reformation or adoption of a hiring hall system which satisfied the NLRB's Regional Director. The charging parties agreed to look elsewhere for any personal compensatory damages (*see* fn. 1). And even though Abdunafi changed his mind and refused at the 11th hour, to execute the settlement, Section 10134.2(b) of the Manual provides:

> "*Unilateral settlement:* Where the respondent agrees to take action which will effectuate the purpose of the Act, an agreement may be consummated without the participation of the charging party."

Accordingly, as the Union agreed to take all necessary action to effectuate the purposes of the Act, the settlement should have been accepted. The proposition is simple. The Union acted in good faith and the region concluded that the settlement agreement would effectuate the purpose of the Act. Abdunafi plainly acted in bad faith—but with the result that the general counsel of the Board withdrew the settlement agreement rather than accepting it unilaterally. *See Leeds & Northrup Company v. N.L.R.B.*, 357 F. 2d 527 (3rd Cir. 1966). This was, of course, contrary to normal Board procedure which expresses policies encouraging settlements. *Farmers Co-Operative Gin Assn.*, 168 N.L.R.B. No. 64. In the context of the foregoing it was a rank abuse of discretion.

It is well established that the Board in administering the Act is acting on behalf of the public interest and not in vindication of private rights. *Jack C. Robinson d/b/a Robinson Freight Lines*, 117 N.L.R.B. 1483, 1485. Thus, in *George Ryan Co., Inc. v. N.L.R.B.*, 609 F. 2d 1249, 1252 (7th Cir. 1979), the court stated:

> "In enforcing the Act the Board is not providing a 'private administrative remedy' but is acting in the public interest to prevent unfair labor practices and ensure overall industrial harmony through efficient use of Board resources. Private right must give way when the Board reasonably determines that the purpose of the Act is best served by settlement." (Citations omitted.)

The Board, in the instant matter, initially determined that "the purposes of the Act are best served by settlement." Its breach of the settlement agreement is *contra* to the public and statutory policy of favoring conciliatory voluntary settlements.

II.

Within the context and above circumstances of an exclusive hiring hall referral system, the NLRB is confined to determining whether discrimination has in fact been practiced.

Whether a hiring hall practice is discriminatory and therefore violative of the National Labor Relations Act, is a determination Congress has entrusted to the NLRB, however, the mere fact that the Union operates an exclusive hiring hall for employment referral is not *per se* violative of the Act. *Cf., Farmer v. Carpenters,* 430 U.S. 290, 292 (1977). It is not an unfair labor practice to incorporate in a collective bargaining agreement a requirement that casual employment shall be secured solely through a dispatching service maintained by the union, and to enforce that requirement by denying casual employment to a worker except in proper referral. *Radio Officers Union v. N.L.R.B.,* 347 U.S. 17 (1954). "It may be that hiring halls need more regulation than the Act presently affords . . . . It may be that the very existence of that hiring hall

encourages Union membership. We may assume that it does . . . . But . . . the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.' . . . Where . . . Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go further and establish a broader more pervasive regulatory scheme." *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667, 675 (1961).

It is well established that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 488 (1951) "[S]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the evidence or the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . " *N.L.R.B. v. Columbia Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939).

The record below is replete with findings by the administrative law judge and adopted by the Board that do not meet the above-stated traditional standard of review demanded by Section 10(e) of the Act, 29 U.S.C. §160(e). The administrative law judge's decision is based almost entirely upon events which occurred almost exclusively either prior to the §10(b) period or subsequent to the issuance of complaint.

The Supreme Court has long held that a finding of a violation of Section 8(b)(2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity and "A union . . . is privileged to make decisions which are reasonably calculated to further the welfare of all the

employees it represents, non-union as well as union, even though a foreseeable result of the decision may be to encourage union membership. *Local 357, Teamsters, supra,* Mr. Justice Harlan concurring.

A reading of *Radio Officers, Local 357, Teamsters* and *Farmer v. Carpenter, supra,* would indicate that the Court's rationale is that a union may refer individuals on the subjective basis of financial need and even though those individuals so aided will be more inclined to favor the union, this would not appear to be necessarily violative of the Act, for it is not, in and of itself, discriminatory in nature.

Independent discriminatory motivation in addition to *an alleged* lack of objective criteria and standards in hiring hall referral system are necessary for a Section 8(b)(1) and (2) violation. *Cf., Local No. 324, International Union of Operating Engineers,* 226 N.L.R.B. 587 and *Local Union No. 174, Teamsters,* 226 N.L.R.B. 690.

III.

The NLRB has not met its statutory burden in order to support its findings that the Union violated Sections 8(b)(1)(A) and (2) of the National Labor Relations Act.

In reckless disregard for the proscription and due process protections contained in §10(b) of the Act, the Board rendered a decision which indicts petitioner's referral procedure based upon events which occurred almost exclusively either prior to the 10(b) period or subsequent to the issuance of complaint.

The Board's decision is an undeniable attempt to avoid the proscription of §10(b) and to provide an improper and prejudicial basis to support a preconceived conclusion of

liability. The broad inquisition is inconsistent with the policy of 10(b) which is "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep. No. 245, 80th Cong., 1st Sess. p. 40 and of course to stabilize existing bargaining relationships." *Local 1424, Machinists (Bryan Mfg. Co.) v. N.L.R.B.*, 362 U.S. 411, 419 (1960).

Although events outside the 10(b) period cannot be used to transform otherwise lawful acts into illegalities, it is concedely proper to use pre-10(b) evidence as background material to shed light upon the true nature of actions undertaken within the 10(b) period. *Local 1424, Machinists v. N.L.R.B.*, 362 U.S. at 416-17. But the availability of time-barred evidence for background purposes does not permit the Board to give "independent and controlling weight to such evidence." *News Printing Co.*, 116 N.L.R.B. 210, 212 (1956).

Evidence within the 10(b) period must be "substantial" in the sense of "significant" or "not inconsiderable" if the reference to time-barred evidence is to be permissible background evidence. *Breckenridge Gasoline Co.*, 127 N.L.R.B. 1462, 1465 (the trial examiner's decision was invalid because it was "inescapably grounded on events predating the limitation period"); *Wine & Liquor Salesman Local 195 v. N.L.R.B.*, 452 F. 2d 1312, 1319 (D.C. Cir. 1971) [pre-10(b)] conduct may not be used as "background" for the purpose of augmenting a finding or employer "assistance" to employer "domination" under §8(a)(2). *See also, N.L.R.B. v. District 30, U.M.W.*, 422 F. 2d 115 (6th Cir. 1969), *cert. denied*, 398 U.S. 959 (1970) [union may not be pre-10(b) events to establish an employer ULP as a defense to a §8(b)(7)(A) charge].

CONCLUSION

For all of the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

G. DOLPH CORRADINO
LEIBOWITZ and CORRADINO, P.C.
Attorneys for Petitioner

ORDER FROM THE DISTRICT OF COLUMBIA CIRCUIT COURT DATED APRIL 7, 1981

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 80-1106

Local 394, Laborers' International Union of North America, AFL-CIO, Petitioner

v.

National Labor Relations Board, Respondent

Wakil Abdunafi, Intervenor

FILED APR 7, 1981

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: McGOWAN, Chief Judge, ROBINSON, Circuit Judge and NORMA HOLLOWAY JOHNSON*, United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the petition for review and cross-application for enforcement of an order of the

* Sitting by designation pursuant to Title 28 U.S.C. §292(a).

National Labor Relations Board and was argued by counsel for petitioner and respondent, respectively, and by intervenor as attorney *pro se*. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court, that the order of the National Labor Relations Board under review is hereby affirmed on the basis of the decision of the Board, *Local 394, Laborers' International Union of North America*, 247 N.L.R.B. No. 5 (Jan. 4, 1980).

Per Curiam
For the Court
s/ George A. Fisher
George A. Fisher
Clerk

DECISION OF THE NATIONAL LABOR RELATIONS BOARD 247 N.L.R.B. NO. 5 DATED JANUARY 4, 1980

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and

WAKIL ABDUNAFI, an Individual

and

BUILDING CONTRACTORS ASSOCIATION OF NEW JERSEY

Party to the Contract

Case 22-CB-3003

DECISION AND ORDER

On March 16, 1979, Administrative Law Judge William F. Jacobs issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Charging Party filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Decision

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the

1. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In addition, Respondent contends that the Administrative Law Judge's credibility resolutions, factual findings, and legal conclusions are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

2. In adopting the Administrative Law Judge's Decision in this case, we do not rely upon his statement in the penultimate paragraph of sec. III, B,2.(a) that Respondent's failure to keep written records concerning the operation of its exclusive hiring hall constitutes a *per se* violation of Sec. 8(b)(1)(a) and (2) of the Act. Rather, we find that Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by operating its exclusive hiring hall without any objective criteria or standards for the referral of employees. In finding the violation, one of the factors we rely upon is that Respondent used no written standards or rules for referrals, thus leaving the operation of its hiring hall within the unbridled discretion of a few union officials; however, this is merely one of several factors which we evaluated in determining whether or not objective standards had been used. While written rules or standards for the referral of employees and written records showing the actual referrals made are certainly relevant evidence as to whether Respondent used objective standards, it is conceivable that a union could prove by means of other evidence that it had consistently used objective standards for the referral of employees without having

(Cont'd)

Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Local 394, Laborers' International Union of North America, AFL-CIO, Elizabeth, New Jersey, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

(Cont'd)

established any written rules or kept any written records. Therefore, we would not find that a union's failure to keep written records or to use written rules in referring employees would, standing alone, constitute a violation of Sec. 8(b)(1)(A) and (2) of the Act. See *Local Union No. 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent (Totem Beverages, Inc.)*, 226 NLRB 690, 700 (1976).

3. Respondent has excepted to the Administrative Law Judge's use of the broad cease-and-desist language in his recommended Order. For the reasons set forth in *Hickmott Foods Inc.*, 242 NLRB No. 177 (1979), we find that a broad order is unwarranted under the facts of this case. Accordingly, we shall modify the Administrative Law Judge's recommended Order by inserting the narrow "in any like or related manner" remedial language.

As noted above, we do not find that Respondent's failure to maintain written standards and records concerning the operation of its hiring hall, standing alone, constitutes a violation of Sec. 8(b)(1)(A) and (2) of the Act. We do, however, agree with the provisions in the Administrative Law Judge's recommended Order requiring Respondent to maintain comprehensive records in the future concerning the operation of its hiring hall for remedial purposes.

Decision

"(d) In any like or related manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge. Dated, Washington, D.C. January 4, 1980.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member
John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT maintain and operate our exclusive job-referral system without the use of objective criteria or standards or in a discriminatory manner.

Decision

WE WILL NOT discriminatorily fail or refuse to refer Wakil Abdunafi or Adolph Farmer to jobs through our exclusive job-referral system.

WE WILL NOT in any like or related manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Wakil Abdunafi and Adolph Farmer for any loss of earnings as a result of our discrimination against them, with interest.

WE WILL maintain and operate our exclusive job-referral system in a nondiscriminatory manner based upon objective criteria or standards.

WE WILL initiate and maintain a comprehensive recordkeeping system which will fully disclose the basis upon which each referral is made, and make such records available to job applicants to enable them to determine for themselves that their referral rights are protected and that referrals are made in a fair and impartial manner.

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
(Labor Organization)

Date _____ By _____
(Representative) (Title)

Decision

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

Decision

JD-105-79
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and

WAKIL ABDUNAFI, An Individual

and

BUILDING CONTRACTORS ASSOCIATION OF NEW JERSEY

Party to the Contract

Case No. 22-CB-3003

George H. Abrams, Esq.
of Newark, NJ, for the
General Counsel.

James R. Zazzali, Esq.
(Zazzali, Zazzali & Whipple),
of Newark, NJ, for Local 394

Jose Rivera, Esq.,
of Brooklyn, NY
for Charging Party, Adolph Farmer
Wakil Abdunafi of Newark, NJ,
pro se.

Decision

DECISION

Statement of the Case

WILLIAM F. JACOBS, Administrative Law Judge: This case was tried before me on December 8, 1977 and January 8-11, 18-19 and 26-27, 1978 at Newark, New Jersey. The charge was filed by Wakil Abdunafi, an individual, on July 1, 1975. The complaint issued January 14, 1977 alleging that Local 394, Laborers' International Union of North America, AFL-CIO, herein called the Union or Respondent Union, violated Section 8(b)(1)(A) and 8(b)(2) of the Act by referring job applicants solely on the basis of subjective, irrelevant unfair and invidious standards and criteria, and by failing and refusing to refer Wakil Abdunafi and Adolph Farmer for employment through the operation of its exclusive hiring hall because they engaged in intra-union activities in opposition to the Union's leadership and in retaliation for their having filed charges and given testimony under the Act. In its answer,[1] the Union admitted certain of the allegations contained in the complaint but denied that it engaged in the alleged unfair labor practices.

Representatives of all parties were present and were given full opportunity to participate in the hearing. Briefs were subsequently filed by Respondent and General Counsel. Based upon the entire record including my observation of the witnesses and after due consideration of oral argument and briefs submitted, I make the following:

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1. The answer was amended at the hearing in order to admit certain allegations relating to jurisdiction and agency.

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Findings of Fact

I. Jurisdiction

Building Construction Association of New Jersey (BCA) is a corporation duly organized under the laws of the state of New Jersey, with its principal offices located in the State of New Jersey and its member-employers likewise engaged in the building and construction industry in the State of New Jersey, and in other states of the United States. During the 12 month period immediately preceding the issuance of the complaint, member-employers of the BCA provided and performed building and construction services valued in excess of $50,000 outside the State of New Jersey and received, for use at their New Jersey jobsites, during the same period of time, materials valued in excess of $50,000 from outside New Jersey. The complaint alleges, the answer admits[2] and I find that BCA is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

The complaint alleges, the answer admits, and I find that the Union is, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Issues*

The issues, as well framed by the allegations of the complaint and answers thereto, are as follows:

2. A motion to amend the answer to admit the allegations dealing with jurisdiction was granted during the hearing.

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1. Whether the Union maintained and operated on behalf of the employer-members of BCA an exclusive job referral system whereby all laborers to be employed by employer-members at construction sites located within the Union's jurisdiction, must be referred to them by the Union.

2. Whether, granting the Union maintained and operated such an exclusive job referral system, it selected for referral and referred applicants for jobs on the basis of solely subjective, irrelevant, unfair and invidious standards and criteria without the use of any objective criteria such as records, lists or rosters and whether the use of solely subjective criteria is *per se* violative of the Union's duty to treat job applicants fairly and impartially.

3. Whether the Union has failed and refused to refer Wakil Abdunafi to jobs through its exclusive hiring all in retaliation for his engaging in protected concerted activities including his having filed internal charges against the Union's leadership and charges with the National Labor Relations Board and the Equal Employment Opportunity Commission in violation of Section 8(b)(1)(A) and (2) of the Act.

4. Whether the Union has failed and refused to refer Adolph Farmer to jobs through its hiring hall in retaliation for similar activities.

B. *Facts*

1. The Exclusive Hiring Hall Arrangement

The Union operates a hiring hall in Elizabeth, New Jersey from which it refers applicants for employment as laborers to contractors including contractors who are members of the Building Contractors Association of New Jersey. General

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Counsel contends that although the contract between the Union and the BCA does not contain provisions for an exclusive hiring hall referral system, the Union, at its Elizabeth, New Jersey location operates or practices an exclusive hiring hall arrangement. The Union denies this allegation.

In support of the exclusive hiring hall allegation, General Counsel produced numerous witnesses including members of the Union and contractors familiar with the means by which individuals are referred to jobs. Thus, Resbeth "Nick" Farmer,[3] a member of the Union for 22 years, who has worked on various construction sites as laborer, steward and foreman, testified as to how hiring was and is done. He stated that when laborers are needed on a job, the foreman tells the steward who then calls the Union Hall and advises John Riggi, the business manager,[4] as to the number of laborers needed, as well as any special qualifications, if any, which may be required of them. Riggi, or one of his two assistants in his absence, then gives any individual he chooses referral slips and sends them to the jobsite where they are hired. Nick Farmer testified that there is no way an individual can obtain work as a laborer in the Union's jurisdiction unless he obtains referral from the Union. Even casually employed summer students must have referral slips and be referred through the Union's hiring hall if they hope to obtain employment. Farmer further stated that if a stranger should come upon the work site and ask the steward for work without first obtaining a referral slip, Farmer would have to call Riggi and first obtain permission for the man to work before he is given employment. Farmer, who has been working steadily over the past several years as a laborer, steward or foreman, got each

3. Hereafter sometimes referred to as Nick Farmer.

4. Throughout all material times Riggi held this office.

job only after first obtaining a referral slip through the union hall, and in his 22 years as a laborer he never obtained work without first receiving approval from the hall. While employed as a steward during this time, Farmer has had frequent occasion to help friends and relatives obtain employment by asking Riggi's permission for them to work. If Riggi gave his permission, they obtained employment. Through all of the years that Nick Farmer has been employed in the laboring field he never once attempted to place any person on a job without first obtaining Riggi's permission, and it was his understanding that this was the procedure that had to be followed.

Ernest Gissendaner, a construction worker and member of the Union for 16 or 17 years, testified that the procedure followed to obtain employment consists of reporting to the Union hiring hall early in the morning (shaping up) and waiting for jobs to be called in from contractors. When a job is called in, it is received in the office by Business Manager Riggi or one of his assistants, who then comes out into the hall and calls the name of, or points to, the man, to whom he chooses to give the job. That man then goes into the office where he is given a referral card to the job. Gissendaner testified that he never, in his 16 or 17 years as a union member, or otherwise, went to a job without a referral card or without first going through the hiring hall procedure, as herein described.

Renious Edwards, a laborer and member of the Union for 30 years has worked regularly as a laborer, steward and foreman over this period of time. Edwards testified that in order to get a job, an individual must first go to the union hall and obtain a referral slip from Riggi. No one has ever come on to one of Edwards' jobs without a referral from the Union, and in the 30 years that he has been a laborer, he has never gotten a job as a laborer in the Union's jurisdiction without first being cleared

through the Union's hiring hall. Similarly, Edwards testified that it is Riggi who appoints stewards. When acting as steward on jobs in the past, Edwards has requested permission from Riggi to allow certain individuals to come on the job and his requests have been granted. Conversely, Edwards has obtained employment by having other stewards request permission of Riggi to let Edwards go to work.

Jonathan Ruth, a member of the Union for 21 years has served as shop steward a number of times. He testified that to get a job in the Union's jurisdiction as a laborer, one must first obtain a referral slip from the business manager to obtain Riggi's permission. For 21 years, according to Ruth, he has obtained employment via this procedure and stated categorically that unless this procedure is followed a man can not get a job.

Leo Charles, a construction worker and member of the Union since 1951, testified that to obtain employment he reports to the Union's hiring hall in the morning and when a job comes in, the business agent calls him into the office, gives him a referral slip and sends him to the job. During the past 5 years he has worked fairly regularly, mostly as steward. As steward, one of his duties is to check the people working on the job. He testified that no one works without a referral slip, including himself.

Similarly, testimony was adduced by General Counsel through numerous other witnesses reflecting the complete control of job referrals by the Union through its business manager. The alleged discriminatees, Wakil Abdunafi and Adolph Farmer testified at length on the subject. Adolph Farmer, a construction worker and member of the Union for 30 years described how, in order to get a job, a laborer must ordinarily report to the hiring hall to shape up. There he waits

until Riggi comes out of his office and picks him to go to whatever job is available. If a particular individual is chosen by Riggi, he is called into the office where he is given a referral slip. Farmer testified, as did the other witnesses, that when he served as steward or foreman on the job, he would permit no one to work on that job who did not have a referral slip. He, himself, never in 30 years got a job without a referral slip and credibly testified that he knew no one who did. As steward, however, upon occasion, he has asked Riggi for permission to bring a friend or relative on the job and, provided Riggi granted the request, that individual could work. Abdunafi supported the testimony of the other witnesses by stating that a man could not get a job merely by appearing at a jobsite and asking for work but had to have a referral slip from the business manager. Moreover, Abdunafi stated that he had tried to obtain jobs without going through the hiring hall procedure but was told at the site that he had to go through the hall.[5] He testified that it was, however, possible for a steward to help an individual obtain employment by going to the business manager and requesting permission for that employee to go to work.

In addition to numerous individuals employed as laborers, General Counsel also called as witnesses, a number of contractors to testify concerning the hiring procedures as practiced within the jurisdiction of the Union. Thus, Joseph F. Fox, then project manager for the Brisco-Arace-Cunder job, testified that when his company decides that it requires additional laborers, it first determines the number and type needed and then assigns to its foremen the job of procuring the required help. The foreman then advises the steward of the company's needs and the steward obtains the required number

5. Documentary evidence in the record supports Abdunafi's testimony.

and type of laborers through the Union's hiring hall. Sometimes the foreman will call the union hall directly. Fox stated that the company never hires laborers off the street but only through the union hall.

Clifford S. Stuart, Jr., vice president of Kramer Gunite, Inc., was called by General Counsel and testified that in order to obtain laborers within the jurisdiction of the Union, he does so by requesting additional people through the steward. He stated that the union hall is his only source of laborers and that the company will not hire off the street. Even when the Company brings its regular, steady laborer employees to work within the jurisdiction of the Union, these people are first cleared through the union hall. Over and above this nucleus of regular employees, the company goes through the union hall for additional help.

Albin F. Hook, Superintendent for Wilhems Construction Company, testified that in order to obtain laborers, he calls the Union's hiring hall and speaks with Riggi or another officer of the Union and requests the number and type of men he needs for the job. Later, the requested employees show up at the job with referral slips and present themselves to the steward. If an individual independently applies for work as a laborer at a jobsite within the Union's jurisdiction, he is not hired but is referred to the union hall. Even in cases of emergency, at night or over the weekend, if Hook finds himself suddenly short of laborers, he calls Riggi at home to have laborers sent to the jobsite. On these occasions too, Riggi sends out the required help.

As herein noted, General Counsel called numerous members of the Union as well as contractors to support its contention that the Union operated an exclusive hiring hall

referral system. Respondent on the other hand did not present a single member witness to testify that he had obtained employment as a laborer within the Union's jurisdiction without either going through the hiring hall or obtaining the permission of the business manager. I conclude that there were no witnesses available who could truthfully offer such testimony. On the contrary, John Riggi himself admitted that if a person wants to work as a laborer within the jurisdiction of the Union, Riggi would know it because that person would not get a job unless he goes to the hall or checks with Riggi first. Riggi's assistant, John Corsentino also supported General Counsel's case in this area when he testified that when a man is referred out to a job on which he is steward, the man must have a referral slip before he is permitted to work, and even regular employees of companies coming into the area must be cleared by the Union before the company calls them into the area to work on the job.

Respondent did not call any contractors, as did General Counsel, to testify that they were free to hire laborers off the street or from other sources to work at jobsites within the jurisdiction of the Union. From Respondent's failure to do so, I must conclude that no witnesses were available who would truthfully testify that they were free to obtain laborers from sources other than the Union for work at jobsites located within the Union jurisdiction. Though Respondent called no witnesses of its own for this purpose, counsel for Respondent thoroughly cross-examined General Counsel's contractor witnesses and adduced certain testimony on the subject. Thus, Joseph Fox testified that in addition to laborers referred by the Union, his company also employs laborers who are members of a sister local, Local 472, located in Essex County. However, Local 472 members are heavy construction laborers, rather than building trades laborers as are the members of Respondent Union. Fox

admitted that Local 472 laborers are hired through Local 472 rather than through Respondent Union. Moreover, when work at the construction site is claimed by both Respondent Union and Local 472, arrangements are worked out. If jurisdiction over the work is clearly that of one or the other of the two unions, employees are assigned to do the work who have been referred by the Local who has jurisdiction over that particular work.

Other apparent exceptions to the exclusive referral system as practiced by Respondent Union, as adduced through the testimony of Joseph Fox, concerns the practice of Fox's company of bringing into the Union's geographical jurisdiction laborers from other locals, which the company has requested by name, and who are apparently considered regular employees of the company.[6] But inasmuch as members of Local 472 and of other locals outside the geographical jurisdiction of Respondent Union are, according to Fox, obtained through their respective locals, this practice does not bear on the question of the existence of an exclusive referral system arrangement at Respondent Union's hiring hall since the tacit agreement whereby Respondent Union recognizes the right of contractors to bring into the Union geographical jurisdiction a certain number of outside laborers, regular or otherwise, does not, at least in this case, directly affect the rights of the individuals to obtain fair and impartial treatment within the jurisdiction of the Union, for the Union clearly has no control over the system of referrals utilized at other hiring halls in other jurisdictions.

Finally, Fox testified that occasionally he has hired college students without first going through the Union. These were

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6. As noted above, John Corsentino, Riggi's assistant, testified that even regular employees must be cleared by the Union before being permitted to come into Respondent Union's jurisdiction to work.

summer employees, college students who were friends of Union members or company officials or supervisors and who were hired for short periods of time as favors to these individuals. However, inasmuch as the Union had four foremen in addition to stewards representing its interest on the Brisco-Arace-Cunder job, concerning which Fox testified, these apparent exceptions to the otherwise exclusive referral system clearly had the tacit, if not the expressed consent of the Union, and do not undermine the otherwise overwhelming evidence that the Union did, as alleged, operate an exclusive hiring hall and referral system.

Clifford Stuart, Jr., also testified that his company similarly employed laborers within the Union's jurisdiction who were obtained from other laborers' locals. These are his regular employees — the nucleus of his operation. According to Stuart, his regular employees clear through the local business agent when they come into the Union's jurisdiction. Like Fox, Stuart testified that occasionally his company hires individuals within the jurisdiction of the Union without going through the Union — these are part-time employees hired for a day or two, a nephew or son of the superintendent or of the local police chief — done as a favor to the person involved. However, individuals working for any longer period of time apparently must follow the usual procedure.[7] For reasons stated earlier with respect to the Brisco-Arace-Cunder job, these exceptional 1 or 2 days favor-hirings do not affect my finding of the existence of an exclusive hiring arrangement.

In summary, I find that the Union operated an exclusive hiring hall as alleged in the complaint. Though the current contract does not provide for or establish an exclusive hiring

7. Two sons of a foreman brought up from Philadelphia to work as laborers within the Union's jurisdiction later became members of the local.

hall, in practice that is the type of arrangement under which the parties have operated and still operate,[8] and the fact that there may have been some infrequent and very special exceptions to the exclusivity of the arrangement does not adversely affect the finding herein under the total circumstances considered.

2. Referrals based upon solely subjective criteria

(a) *Prior to September 1977*

General Counsel contends and indeed the complaint alleges that the Union has, in the operation of its exclusive hiring hall, selected for referral and referred applicants for employment based upon entirely subjective criteria and thereby violated its duty, as the representative of all employees and applicants for employment, to represent all of them fairly. The Union, via stipulation at the hearing admits that its business manager, John Riggi, utilized subjective criteria in deciding which applicants for employment should be referred to which jobs.

General Counsel presented a number of witnesses who testified to the fact that subjective criteria were used by Riggi in deciding who should be referred to jobs. Thus, Wakil Abdunafi, a member of the Union for 9 years, testified that Riggi simply chose whomever he wished to work at a given time and referred him to a job by handing him a referral slip. He noted that it did not matter what time the individual arrived at the hiring hall and that time of arrival was not a factor in Riggi's decision to send a

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8. *Local Union No. 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent (Totem Beverage, Inc.),* 226 NLRB 690; *Castleman and Bates, Inc. (Local 17, Sheet Metal Workers International Association, AFL-CIO)* 200 NLRB 477, 482.

man to work. Prior to September 1977,[9] no one signed in at the hall. Further, Abdunafi stated that no standards or guides were utilized by the business manager or his assistants to help them choose one applicant over another, nor were any records kept which would enable these union officers to determine who had been referred out in the past and perhaps thereby enable them to choose on the basis of previous hours worked who should, in fairness, get the next available job.

Adolph Farmer similarly testified that he knew of no standards by which Riggi and his assistants were guided in choosing applicants for referral; none were posted. During Adolph Farmer's testimony a stipulation was received into the record that, indeed, no records were kept at the hall to show either where applicants had been referred on a given day or what jobs were available for bidding or for referral. The testimony of Abdunafi and Adolph Farmer were supported affirmatively, in part or *in toto*, by all of the General Counsel's witnesses that testified regarding the subject. No one disputed their testimony concerning the lack of written standards or records.

In summary, if General Counsel's witnesses cannot be said to have adequately testified affirmatively that solely subjective criteria were used, it can safely be concluded that any objective criteria upon which choices for referral could be made were entirely absent. Thus, reporting time at the hall was not considered of importance for no sign in sheet was in use, and it was credibly testified to that reporting time was clearly not a visible consideration in Riggi's decision as to his choice for referral to specific jobs. Likewise, since no written records were kept indicating who had been referred to what jobs in the past,

9. Certain reforms were undertaken in the referral system in September 1977 which will be treated separately, *infra*.

and no records kept as to future available jobs and possible referrals, no apparent objective attempt was being made to distribute jobs either by number or by hours in such a manner as to ensure a fair and impartial distribution of available work. Riggi's testimony concerning his keeping such information in his head is rejected in light of the number of applicants, jobs and hours of which he would have had to keep mental records over the period of years in question.

The Union, in addition to admitting that no standards, written guidelines or records of the type discussed *supra*, were kept, further admits, in keeping with the allegation contained in the complaint, that subjective criteria were the basis upon which the Union made its referrals, and moreover contends that the use of such subjective criteria is both proper and desirable under the circumstances. In support of this contention, the Union relies primarily on the testimony of John Riggi who described the referral procedure as well as the subjective basis upon which he ostensibly relied in deciding which applicants should be referred to the jobs available. Riggi testified that contractors, through their superintendent, or the foreman or steward on the job would call the hiring hall to request the Union to send out a certain number of men, sometimes particular types of workmen.[10] When Riggi received these calls he would look out into the hall to see if there were any men present who could do the job which was to be filled. If such a man were present in the hall at the time, Riggi would call him in, hand him a referral slip and send him to the job. In determining which individual best fit the requirements of the job, Riggi testified that he used certain subjective criteria. First, he considered the ability of the

10. Riggi also received information as to possible future jobs through the utilization of Dodge Reports and through attendance at pre-job conferences with contractors.

individual to do the work involved. Riggi testified that he knew which of the people at the hall could rig a scaffold, operate a fork lift, power buggy or jackhammer or work with concrete. Riggi emphasized that it was important that men capable of performing such functions were sent to the job rather than men "off the street" because "there's a lot of human lives at stake here." A second basis for choosing a particular workman for a job, according to Riggi, was the consideration of the status of the workman's situation with regard to the Welfare and Pension Funds. To remain qualified for welfare and pension benefits, a member must work a certain number of hours, making the necessary contribution to these funds. If a particular member were in danger of falling in arrears in his payments, Riggi would give some consideration to this fact when making referrals. Finally, Riggi testified, he gave consideration to an individual's financial condition when making referrals. Thus, if an individual should approach Riggi and advise him that he was in a financial bind, that a mortgage payment was due, that he needed something for his kids, or that he had a doctor b'll to pay, Riggi would give weight to such matters in determining who should be referred.[11]

Respondent takes the position that the use of such paternalistic considerations in making referrals are not only lawful, but when properly administered, in a non-discriminatory manner, the use of such criteria is even desirable. General Counsel counters that the use of subjective criteria such as those described herein, places in the hands of the single individual making the decisions based on such criteria, tremendous power,

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11. As will be shown *infra*, Riggi gave no consideration to pension and welfare payments or financial insecurity where Abdunafi was concerned though Abdunafi's financial problems were well known throughout the local, including his having been evicted from his home.

such as to necessarily have "a significant impact on the membership as they realize what the consequences are of falling into disfavor with Riggi." General Counsel[12] correctly points out that Riggi decides himself whether a man has the necessary qualifications to do a particular kind of job and personally decides whether an individual's adverse financial condition is difficult enough to warrant special consideration in determining whether he or someone else should be referred to a particular job. Discriminatory motivation aside, General Counsel argues that Riggi is in no position to make the decisions he does on the basis of the subjective criteria he utilizes because he does not spend that much time at the work sites and does not actually know how capable the individuals he sends out to the jobs are. He may, as he testified, know the capabilities of the "old timers" but admittedly does not know the abilities of the younger men, much less those of the non-members who may utilize the hall's services sporadically or for the first time. Clearly, if it is known by prospective applicants that Riggi chooses individuals for referral, not on the basis of the man's actual abilities, but rather on the basis of how long and how well Riggi has been acquainted with a man, it would follow that such prospective applicants would consider it worthwhile not only to be a member, in good standing, of the Union, but above all, a friend of Riggi. Thus, assuming arguendo, as General Counsel argues, that Riggi chooses individuals for referral on the basis of how long and well he has known them and rightly or wrongly, assumes on the basis of his acquaintanceship that the "old timers" are better workmen than the younger union members or "off the street" applicants, General Counsel's logic does not appear faulty in that granting all this to be true, it would tend to drive individuals to curry favor with the business manager, and to join and become members in good standing in the Union. The

12. General Counsel's brief p. 35.

result would be, necessarily, enhancement of Riggi's and the Union's power.[13] But, again, assuming that a business agent uses the criteria of "capacity to do the job" in referring individuals and does so on the basis of his knowledge as obtained from frequent visits to the worksites and eyewitness observations of individuals actually performing tasks, thereafter making nondiscriminatory referrals on the basis of the knowledge he obtains from these observations, such referrals would still be subjective in that the business agent makes his determination subject to his own perceptions as witnessed by him at the jobsites. But are we to reject this kind of expertise simply because the process is open to possible abuse? Or is it the better course to permit the use of subjective criteria in referrals and question only those cases where abuses occur, where discriminatory motivation or where invidious considerations appear to have tainted the fair and impartial character of the system, be it based upon subjective criteria or otherwise.

Further, General Counsel also attacks the Union's, that is Riggi's utilization of such subjective considerations as an individual's financial condition as a basis for determining whether or not a specific individual should be referred to a particular job rather than someone else. The theory is, of course, that if the Union, through Riggi, chooses to aid one individual rather than another because the former is more in need than the latter, the result would again be to encourage union membership. Showing favoritism toward those individuals who cannot pay their mortgage or medical bills or are about to lose their welfare or pension benefits surely encourages those individuals to be loyal to the Union, but as stated in *Local 357, Teamsters, supra:*

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13. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *N.L.R.B.* 365 U.S. 667, 671.

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustment of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in *Radio Officers v. Labor Board, supra,* the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

So, applying the Court's rationale to the instant case, one can reasonably conclude that although referring individuals on the subjective basis of financial need will likely result in those individuals so aided being more inclined to favor the Union, this does not appear to be necessarily violative of the Act for it is not, in and of itself, discriminatory in nature.

The record indicates that a certain factionalism has manifested itself among the rank and file of individuals utilizing the services of the hiring hall. Quite clearly a number of individuals find the current union leadership lacking in many ways. Others, however, have shown fierce loyalty to Riggi and

his assistants. No doubt a number of the latter approve of the use of such subjective criteria as financial need as one basis for making referrals, and who can say it is wrong to award jobs to those who need them most. Perhaps, by the nature of things, those who are most friendly with the Union hierarchy, Riggi in particular, are most likely to confide in him that they are in particular need of work, while those who have found grounds for disagreement will choose, for one reason or another, not to approach him for special consideration. But granted that this is, perhaps, the situation that exists, should a decision be rendered that a union may not choose to refer out one man before another because the former is under greater economic stress than the latter. Should there be a blanket ruling that no such subjective considerations be entertained. I think not, for the Supreme Court has held that:

> Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go further and establish a broader, more pervasive regulatory scheme.[14]

It would thus appear that the Board may not ban the use of all subjective criteria in determining order of referral as long as those criteria are non-discriminatory. However, above and beyond the Supreme Court's apparent proscription that the Board has not been empowered to establish specific criteria for the "proper" running of a hiring hall, there is also the philosophical/legal consideration enunciated by Justice Harlan in the cited case:

> A union . . . is privileged to make decisions which are reasonably calculated to further the

14. *Local 357, Teamsters, supra.*

> welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to encourage union membership.
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> This Court's interpretation of the relevant statutory provisions has recognized that Congress did not mean to limit the range of either employer or union decision to those possible actions which had no foreseeable tendency to encourage or discourage union membership or concerted activities. In general, this Court has assumed that a finding of a violation of Section 8(a)(3) or 8(b)(2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity.

I would find that the subjective criteria utilized in part by Riggi in making certain referrals, such as his own personal educated view of an individual's capacity to do certain types of work and the financial condition of an individual, do not necessarily reflect discriminatory motivation and unless otherwise shown to be discriminatorily, unfairly or invidiously motivated, would not be *per se* violative of the Act, provided further, that such criteria are subordinated to an overall, established objective referral system easily understood by and accessible to prospective applicants for referral.

Thus, what is basically wrong with the referral system used by the Union in the instant case is not the use of the particular subjective criteria defended by Respondent as not only lawful but desirable but the fact that subjective criteria were the *sole* basis for referral without any visible objective criteria being utilized to ensure fairness and impartiality. As noted by Judge

Reis in a context[15] somewhat different than that of the instant case, but dealing with the necessity of making information available to prospective applicants for referral:

> There inheres an enormous potential for abuse in a hiring hall which maintains no published priority lists, which operates with no written standards for referral, and in which the livelihood of men has been confided to the unbridled discretion of a few union officials.

Judge Ries, with reference to the congeries of his own case continued:

> There are many records here, not examined into at hearing, which facially suggest discrimination or preference which beg for explanation . . . While I would suppose that Section 10(b) would lay to rest the possibility of further Board proceedings as to these particular records, the broader question of whether a hiring hall may be operated in this fashion should be pursued.

Within a year of Judge Reis' decision, another case[16] was heard and decided in which Judge Holmes noted:

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15. *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, Associated General Contractors of America, Inc.),* 226 NLRB 587, 595.

16. *Local Union No. 174, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Independent (Totem Beverage, Inc.),* 226 NLRB 690.

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> The [referral] system was operated without any objective criteria or standards and in a discriminatory manner. Simmons' [a union official] testimony in this regard is the most significant because Simmons was the sole person with complete authority over who would be referred. Simmons testified, "If you're asking whether or not I have written standards or any other kind of standards, no, most of them are in my head."

This of course reflects the situation extant here. Judge Holmes commented:

> It seems to me that . . . subjective criteria rather than objective criteria were used. . . . [The Union] did not have any written standard or any other kind of standards for referral. . . .
>
> Accordingly, I find that the Respondent has operated its hiring hall and referral system for referral of permanent employees to Totem without any objective criteria or standards for the referral of unit employees and in a discriminatory manner in violation of Section 8(b)(1)(A) and (2) of the Act.

The Board[17] in reviewing Judge Holmes' decision did not treat the question of whether a hiring hall which utilizes purely subjective criteria in the operation of its referral system and totally neglects the use of any objective criteria in the operation of that system is *per se* in violation of the Act. Judge Holmes

17. The panel consisted of members Jenkins, Penello and Walthers.

found independent discriminatory motivation in addition to the lack of objective criteria and standards in the referral system in the case cited. Nevertheless, in a subsequent case there is the following notation in a footnote:[18]

> Member Jenkins, in accord with the Board's decision in Local Union No. 174, Teamsters (Totem Beverage, Inc.), 226 NLRB 690 (1976), would find that Respondent's operation of an exclusive referral system without any objective criteria for the referral of employees violated Sec. 8(b)(1)(A) and (2) of the Act and that the operation of the discriminatory referral system was one of the reasons for Respondent's failure to refer alleged discriminatees Hendrix, Newcomer, and Penrose. Accordingly, Member Jenkins would find further that said failure was discriminatory and in violation of Section 8(b)(1)(A) and (2) of the Act.
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> Chairman Fanning and Member Murphy agree with the Administrative Law Judge that the evidence fails to establish that Respondent's failure, if any, to refer Hendrix, Newcomer, and Penrose was a result of the manner in which the hiring hall was operated or that—at least with respect to Penrose—there was any failure to refer.

Since Member Jenkins in *Totem* made no comment on the subject of a hiring hall operating without objective criteria being

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18. *Laborers' International Union of North America, Local No. 282, AFL-CIO (Millstone Construction Company, et al.)*, 236 NLRB No. 7 fn. 3.

per se violative, yet appearing in *Millstone* as though he had found it so, and since the rest of the panel in each of those cases was different, there is no way of knowing what the *Totem* panel would do in the *Millstone* case, that is, whether they would have applied Board Member Jenkins' *Totem* rationale to *Millstone* and agreed with his conclusion.

If I am not reading into Board Member Jenkins' rationale something that is not there, I understand him to be holding that in a particular case, if there are findings of specific violations of Section 8(b)(1)(A) and (2) toward certain referral applicants which satisfy the motivational requirements of Local 357,[19] and the discriminatory failure or refusal to refer occurs in the context of the operation of a referral system based upon *solely* subjective criteria without any objective criteria being utilized, then the operation of such a hiring hall arrangement is itself violative and any individual shown to have suffered by virtue of that discriminatory referral system is discriminated against within the meaning of the Act, even without a finding of particular discriminatory motivation as regards those individuals.

Although I have not been able to make a finding on the subject on the basis of *stare decisis* in Board or in court law, philosophical and legal bases for holding that the operation of a hiring hall referral system void of objective criteria is *per se* violative of Section 8(b)(1)(A) and (2) of the Act may be found in that line of cases which holds that a union owes to the individuals it represents fair and impartial representation, and that fair and impartial representation in the context of an exclusive hiring hall situation requires the union to furnish to individuals so requesting it, information concerning the referral

19. *Local 357, Teamsters, supra.*

or out-of-work list including names and addresses of potential applicants for referral who are included thereon. The Board has stated[20] that a union's arbitrary refusal to comply with an individual's reasonable and manageable request for job referral information is a breach of its duty of fair representation and therefore violative of Section 8(b)(1)(A) of the Act. In finding the violation, the Board noted in the cited case that the Respondent Union's refusal to prepare the list of employees on the referral register and supply it to the individual requesting it, deprived that person of the only means whereby he could fully investigate whether or not his referral rights were being protected. In light of this rationale, how can it possibly and logically be concluded that it is violative to deny referral information to an individual who needs it to protect his referral rights but not a violation for a business agent or union to deprive the entire 400 to 500 individuals dependent for their livelihood on referrals, as in the instant case, of similar necessary referral information by the simple expedient of refusing to keep standards or records which could be used by them to insure fairness and impartiality in the operation of the hiring hall. If, as is the case in the instant proceeding, the only standards or records of referrals are kept in the business manager's head, that procedure effectively denies all applicants for referral the information which the Board has stated they need to protect their rights. Failure to keep proper records which may serve as objective criteria for referral, and the operation of a hiring hall on the basis of solely subjective criteria, as in the instant case, is therefore *per se* violative of the Act.

To the extent that the record reveals that the business manager also granted the request of various stewards and foremen for the referral of specific individuals, inasmuch as this

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20. *Local No. 324, I.U.O.E., supra.*

practice is open to the same objections as the failure to maintain appropriate objective standards, and is, in effect, another means of avoiding the proper use of objective criteria in making referrals, it too is, for reasons stated, violative of the Act. Backdooring, which, in effect, this practice amounts to, in order to avoid the fair and impartial operation of a proper referral system is discriminatory.[21] *International Association of Bridge, Structural and Ornamental Iron Workers, Local 433 (The Associated General Contractors of California, Inc.),* 228 NLRB 1420.

(b) *After September 1977*

The Union takes the position that as of September 1977 it devised a referral system containing the necessary objective standards which would insure a fair and impartial operation of its hiring hall. Although not all of the plan's provisions had, as of the time of the hearing, been instituted, several of the more important provisions were put into effect. Among these were a work classification system, a sign-in procedure, and a carry-over feature designed to assure each applicant for referral that if he is not referred out to a job the first day, his name will remain on the list and be moved up in proper order, so that he is referred out the second or third day as jobs become available. According to the Union, the essential elements of the plan are in operation and working well, and the few exceptions which came to light during the hearing are insufficient to warrant a finding that the new plan is defective.

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21. Although this issue is not specifically and separately alleged in the complaint, it is sufficiently encompassed within the broad language of paragraph 13 to permit findings to be made with regard to it inasmuch as the matter was fully litigated at the hearing. *McGraw Edison v. N.L.R.B.*, 419 F. 2d 67.

Decision

General Counsel, on the other hand, contends that the September 1977 plan does not reflect any great change in the operation of the hiring hall since basically it is ignored by Riggi who continues to refer individuals on the basis of the same subjective criteria as he has in the past.

With regard to the changes in hiring hall procedures, as reflected in the September 1977 plan, it should first be noted that any reform in the hiring hall referral system that may have been instituted subsequent to the issuance of the complaint alleging 8(b)(1)(A) and (2) violations occurring prior thereto does not, of course, obviate the need for a remedial order, for it is settled law that the discontinuance of unfair labor practices does not dissipate their effect. The Union, does not dispute this fact. The Union does, however, argue that an abortive attempt on its part and on the part of General Counsel to reach settlement was based, in part, on the new hiring hall procedures initiated in September 1977 and implemented shortly thereafter, and requests that on the basis of the newly instituted referral system, the settlement be unilaterally approved. During the hearing, I refused to approve the settlement on grounds that Wakil Abdunafi and Adolph Farmer, alleged discriminatees, were offered nothing to make them whole for losses which they may have suffered due to the alleged failure of the Union to refer them. I hold to my decision on this score and for the reasons cited.

Finally, with regard to possible violations on the part of the Union since the implementation of the new hiring hall plan, it should be noted that the hiring hall plan of September 1977 was instituted long after issuance of complaint. The complaint did not, therefore, contain either allegations concerning the institution of that plan or its later implementation, nor was the complaint amended at hearing to include such allegations.

Decision

Although counsel for General Counsel collaterally attacks the means by which referrals have been made at the hall under the plan since September 1977, as a sort of adjunct to its case in chief, in an attempt to show that its use did not ameliorate conditions at the hall, he did not specifically request that the plan or its utilization be found in violation of the Act. Therefore, in light of the fact that there is no specific allegation concerning the new hiring hall plan, that evidence in the record concerning the plan is at best sketchy, that the plan was instituted by the Union in a good faith effort to reach settlement, while working together with the Regional office to solve the problems theretofore found to be in evidence, and that, at any rate, Abdunafi has filed new charges specifically related to the new hiring hall referral system, and these charges are currently under investigation,[22] I will make no finding concerning the new hiring hall referral system or its operation.

3. The Alleged Failure to Refer Wakil Abdunafi

(a) *Abdunafi's protected activities*

Wakil Abdunafi, the Charging Party herein testified at length concerning his intra-union activities and his filing of charges and giving of testimony under the Act, for which, it is alleged, Respondent Union retaliated against him by refusing to refer him for employment. Abdunafi's testimony is voluminously supported by a myriad of documents.

Though perhaps not necessary to a finding of a violation with regard to the Union's failure to refer Abdunafi, the totality of his intra-union efforts to change the referral system is laid out

22. Case No. 22-CB-3849.

in minute detail herein, in order to show how impossible it is for a job applicant to obtain redress in an exclusive hiring hall situation where that individual has been denied referrals, where the union hierarchy is in complete control of such referrals and maintains no criteria or standards upon which that applicant or other applicants may rely to support their grievances, and to show, moreover, the hopelessness of that individual's case where a single individual or small group of individuals, not only controls all job referrals but also the dispensation of justice within the union.

Abdunafi and Business Manager Riggi have been acquainted with each other for 20 to 25 years. During most of this period their relationship was relaxed and friendly. They socialized together and Riggi befriended Abdunafi on a least one occasion with personal financial help when Abdunafi was in need. This was in 1965. Riggi was even cosignatory to a loan for Abdunafi on a later occasion. Through 1968 and 1969 this relationship continued to be cordial and was reflected in the referrals which Abdunafi obtained for himself, his friends, and between 1965 and 1970 for his son.

In 1969 or '70 Abdunafi began to take issue with certain policies within the Union which were implemented or fostered by Business Manager Riggi and the Executive Board of the Union.[23] Abdunafi testified and Riggi conceded that Abdunafi and Adolph Farmer were the most vocal members of the Union critical of the policies which Riggi and the Executive Board favored, from 1969 on. It was about this time, according to Riggi, that the friendly relationship between Abdunafi and the

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23. Riggi testified that Abdunafi was opposed to union policies and was outspoken about it for over 20 years. There is no evidence, however, to support Riggi's bald assertion relative to this matter.

business manager began to deteriorate. They ceased to socialize and Riggi admitted that he did no favors for Abdunafi thereafter.

In 1971 Abdunafi, supported by Adolph Farmer, spoke out from the floor at numerous union meetings as well as elsewhere, against the policies of the union leadership. Although other members, upon occasion likewise spoke out against such policies, it is generally conceded by all that Abdunafi and Adolph Farmer were the most outspoken. Upon occasion when Abdunafi and Adolph Farmer criticized the way that the Union was run, their criticism resulted in shouting matches between them and the union leadership and some meetings were closed as "disorderly."

At one meeting in mid-1971 there was a discussion concerning pensioners coming out of retirement and being referred to the best jobs. Abdunafi and Adolph Farmer first raised the issue and vociferously objected to this practice. Emmanuel Riggi, the business manager's father, was one of the pensioners specifically discussed at this meeting. The discussion erupted into a heated argument between Abdunafi and Adolph Farmer on the one hand and John Riggi and his father on the other. After the meeting was adjourned as disorderly, John Riggi went to the back of the meeting hall, grabbed his father by the arm and told him, "Don't argue with these guys, Pop, I will hit them in the pocketbook where it hurts."[24] I find the incident discussed herein as having occurred as described by General Counsel's witnesses.

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24. This event is described as testified to by Abdunafi and Gissendaner, both witnesses for General Counsel. Riggi denied having made the statement and describes an entirely different situation. Riggi's denial is, however, discredited in favor of that of General Counsel's witnesses.

Decision

Abdunafi's and Adolph Farmer's attempt to restrict job referrals to non-pensioners is activity protected under the Act and Riggi's threat to "hit them in the pocketbook" clearly indicates animosity and an intention to retaliate against Abdunafi and Farmer because of their participation in this protected activity. But for the restraints of Section 10(b), the threat would be found to be violative under the Act.

During meetings in early 1971, and prior thereto, Abdunafi complained to Riggi about not being referred out to jobs. He and Adolph Farmer repeatedly made a point not only of the fact that pensioners were getting the better jobs as noted above, but also that college students were being referred out to jobs during holiday seasons and in the summer, while members in good standing, such as themselves, were out of work. In May Abdunafi wrote a letter to the International in which he complained that in referring men to jobs the Local did not keep a roster, and that its failure to do so resulted in card carrying members being denied work while pensioners, college boys and non-members were getting jobs. He requested that the International take action at the forthcoming September convention to ameliorate the problem and specifically requested permission to address the convention himself on the matter. The International replied that it would refer Abdunafi's letter to its New York regional office.

On May 28, 1971 Abdunafi brought internal charges against Business Manager Riggi charging him with racial discrimination, alleging that of 40 new members brought into the Union, 36 were Italian, only 4 blacks and none were Spanish Americans. He charged that this was an attempt on Riggi's part to control the Union. He further charged Riggi with preferential treatment of certain members, thus attacking the referral system, as operated by Riggi as being unfair. He noted in his charges that

while he had been out of work for 6 months, certain other individuals had been put to work several times on different jobs, including the new members who were referred out to jobs while he, Abdunafi, was not considered at all. Finally, he objected to the fact that Riggi referred college students to jobs during the holidays, again while Abdunafi and other members in good standing were ignored. He asked for a new hiring hall system of referral. These were the first charges ever filed personally against Riggi.

About this period of time, during the union meetings, Abdunafi and Adolph Farmer vocally took issue with the union leadership with regard to other matters. When at the June 4 meeting a recommendation was received to suspend summer meetings, Abdunafi and Adolph Farmer strenuously objected. Once again, a rather heated argument ensued. Similarly, Abdunafi and Adolph Farmer took issue with the union leadership, and Riggi in particular, throughout the meetings held in 1971 on such issues as the amount of money provided out of the Union's treasury for delegates to the September convention, money paid out of the treasury to Riggi, and, of course, the contents and subject matter of Abdunafi's charges against Riggi, all of which frequently resulted in what some witnesses described as personal attacks on Riggi by Abdunafi and which, others described simply as heated arguments between or among the participants.

About the time that Abdunafi brought his charges against Riggi he similarly brought charges against other members of the union leadership. He filed one charge against the president of the local and its entire executive committee on grounds that they permitted a raising of dues on a show of hands without taking a proper secret ballot vote. The record is not clear as to the outcome of these charges.

Decision

Despite the opposition of Abdunafi and Adolph Farmer to the suspension of meetings during the summer of 1971, those meetings were nevertheless suspended. Abdunafi therefore, once again, contacted the International stating that his charges against the Executive Board and the "accused" should have received attention. He noted his anger and argued that since meetings had been suspended he had to bring his complaint directly to the attention of the International. He appealed that there should be constitutional modifications to protect his rights and the implementation of a new referral system using a roster to protect dues paying members. He charged that members had no voting power, that Blacks were being starved out of the local and that there was a conspiracy between the local's Executive Board and the Union's New York regional office to delay action. In late October, receipt of Abdunafi's letter was acknowledged by the International. Abdunafi was advised that his earlier correspondence had been forwarded to the New York regional office of the Union but that the regional office had been unsuccessful in trying to contact Abdunafi. It was then suggested that Abdunafi contact a particular official at the New York regional office who would do whatever possible to straighten everything out.

In October 1971 Abdunafi received notice that his charges against Riggi would be heard by the Executive Board on October 18, 1971. The hearing was, in fact, held on that date, and by letter dated October 27, 1971, Abdunafi received the trial board's report. The report stated that although Abdunafi was free to bring charges against any member or officer of the Union, he had failed to indicate any basis for the charges he had brought. Nevertheless, the report stated, his charges were heard, but after hearing testimony from both sides the trial board found no grounds for the complaint. It noted that the decision being rendered was an informal one because "no complaint of any violation of the Uniform Local Union Constitution exists."

It further noted "that a previous similar complaint by another brother member was heard and judged by the Trial Board, and the decision rendered was the same" and that "any future similar complaints of facial discrimination or preferential treatment will not be heard by any Trial Board of Local 394 unless a violation of the Uniform Local Union Constitution is cited."

When Abdunafi received the decision and report of the Trial Board, apparently in disagreement with its findings, he filed new charges, this time against the Recording Secretary, the entire Executive Board and the Hearing Panel for "not being fair and impartial and for being influenced by Brother Riggi whom they must depend on for work." Abdunafi stated in his charge that to prove his case against Riggi he wanted certain union records produced upon which he wished to rely, but that when he asked for the records, Riggi stated that he would not permit their production. According to Abdunafi's charge, when Riggi forbade production of the records, the Trial Board did not pursue the matter. This prevented Abdunafi from obtaining the evidence he needed to support his charge against Riggi. Abdunafi charged that the Trial Board members were dependent upon Riggi for work since he was in total control of referrals and for that reason they would not act impartially for fear of not obtaining work in the future. Thus, Abdunafi implied that, not only does Riggi determine who makes a living through his control of the referral system, but that he also, through this power, controls justice within the Union, thereby cutting off any effective means of appeal, again by virtue of his control of the entire hiring hall referral system. This, at least, was Abdunafi's charge.[25]

25. The numerous documents received into the record by stipulation of the parties, were received for the purpose of showing the extent of Abdunafi's intra-union activity not for the truth of assertions contained within the documents.

Decision

On November 3, 1971 Abdunafi appealed the Trial Board's decision and in his letter of appeal to the International of that date, implied that the local had engaged in discrimination based on color, national origin and/or religion and charged it with preferential treatment noting that the entire Executive Board of the local, the men who heard and judged Abdunafi's charges, represent a controling faction in the local who "have raped the Local of all the best jobs for themselves, family and friends." Receipt of Abdunafi's appeal was acknowledged in December 1971 by the International and he was later advised that a hearing on his appeal would be conducted on January 20, 1972 in New York City.

Also on November 3, 1971, Abdunafi filed additional charges against Jack Merlo, President of the Union and against the entire Executive Board for suspending the July, August and September union meetings, during which suspension, the alternate candidate picked to attend the convention was, he charged, chosen illegally. The new charges also included the allegation that Recording Secretary Phillip Renna and the entire Executive Board had tampered with and falsified the minutes of the June meetings in connection with the extraction of $3,000 from the Union's treasury. Though not clear from the document itself, it would appear that the charge was that a motion had been included in a previous meeting's minutes to give $1000 to each of the delegates to the convention, and that the minutes, as written, did not reflect what actually had occurred.

On January 14, 1972 the Executive Board through its secretary, Phillip Renna, advised Abdunafi that the charges included in Abdunafi's letter of November 3 would not be heard because his charge that the suspension of meetings during the months of July, August and September was illegal, was the subject of an earlier charge filed by another member which had

already been resolved and that the resolution of the earlier charge disposed of Abdunafi's charge. With regard to Abdunafi's charge that the alternative candidate to the September convention had been chosen illegally, the Executive Board decided that since the Executive Board had selected two alternative delegates at a meeting on September 18, 1971, and one of them attended the convention, the procedure was not in violation of the constitution. With regard to the charge of tampering with and falsifying minutes in order to extract monies in violation of the Constitution the Board noted that members Adolph Farmer had filed a similar charge and had been denied a hearing because there was no evidence of any tampering with or falsifying of minutes. The report further noted that the Constitution authorizes lawful expenditures and the allottment of convention expenses is a lawful expenditure. It concluded that since Farmer is appealing to the International, no Trial Board hearing would be held. Finally, with regard to the charge that delegates to the International Convention held in September 1971 were alloted $1000 each in violation of the International Constitution, the report noted that the International Constitution allows for per diem expenses by the International to delegates but does not state that a local union cannot supplement these expenses and there is therefore no basis for the charge. Upon receipt of the local Executive Board's report, Abdunafi wrote a letter to the International complaining about his being refused a hearing by the Executive Board of the local union, noting that there is nothing in the constitution which permits denial of a hearing on the grounds tendered by the local union's Executive Board. Abdunafi was advised on February 28, 1972 that the matter had been placed on the International General Executive Board's agenda. On June 21, 1972 he was further advised that a hearing panel of the General Executive Board would consider the matter on July 11, 1972 in New York City. Though scheduled for hearing in New York City on July

Decision

11, 1972, the record reveals that the matter was heard or also heard by the General Executive Board sometime during the period July 24-28, 1972 in Banff, Alberta, Canada. The hearing panel in Banff decided[26] with regard to the suspension of meetings in July, August and September 1971 that "the time to hold said meetings has passed and they cannot be ordered to be held." The panel further found that at the meeting of June 4, 1971 a motion was made, seconded and passed to allow each delegate to the convention expense money, and presumably it was therefore legal; that the charge that the minutes were falsified was not proven; and that the Executive Board indicated that there was no falsification of the minutes and that no trial would be held on these charges. The panel recommended that the appeal be denied and its recommendation was adopted.

On February 2, 1972 the General Executive Board of the International met in Miami to consider Abdunafi's appeal dated November 3, 1971 concerning his charges of racial discrimination and preferential treatment levelled at Riggi and dismissed by the local union's Executive Board. The General Executive Board recommended that Abdunafi's appeal be denied as he had failed[27] to substantiate his charges against Riggi. This recommendation was approved.

On December 12, 1972 Abdunafi attempted to file charges directly with the International. He charged the entire local union's Executive Board with disregard of the constitution when it filled the vacancy occasioned by the resignation of the vice president with an individual who did not meet the requirements to fill that office as outlined by the constitution. He requested the

26. Both Abdunafi and representatives of the local union made appearances.

27. Abdunafi was present as were representatives of the Union.

International to act because, he complained, the local's Executive Board always finds itself not guilty and because he could not get a fair hearing because the Executive Board consisted of relatives and friends of the union leadership. He charged the local's Executive Board with being corrupt and requested the International to intervene. The International, on December 20, acknowledged receipt of Abdunafi's letter and advised him that charges on the local level must first be heard by the local's Trial Board after which appeals may be taken to the General Executive Board of the International. On January 16, 1972 Abdunafi followed the suggestion of the International and filed his charges against the Union's entire Executive Board at the local level alleging that it had chosen a member to fill the vacancy for the office of vice president who met none of the qualifications for the job. Receipt of Abdunafi's charges was acknowledged on March 14, 1973 at which time he was advised that they would be heard on March 23, 1973. Meanwhile, Abdunafi wrote one more letter to the International complaining about the delay caused by the failure of the local union's Executive Board to meet, and bringing to the attention of the International the fact that he had been filing charges and appeals without success for two years and had not worked for one of these years. He blamed, once again, the hiring system and strongly implied that his failure to obtain work was in part due to the fact that he filed charges. On March 20, 1973, Abdunafi indicated his distrust of both the Local Union and the New York Regional office when in a letter to the International he requested that an observer be sent to the forthcoming March 23 hearing and that the observer not be sent from the New York Regional office. The local Executive Board met on March 23 as scheduled and on March 28, 1973 issued its decision finding that since Abdunafi presented no evidence, the complaint against the Executive Board should be dismissed. Abdunafi subsequently appealed this decision to the International and in the appeal

explained that he had brought witnesses with him through which he intended to submit evidence but that Riggi prevented him from using his witnesses. He also explained that when he was asked to produce evidence in support of his charge, he told the Executive Board that the evidence was contained in his charge and in the minutes of the meeting at which the alleged violation of the constitution occurred. Riggi, however, refused to permit the use of the minutes as evidence, and for this reason Abdunafi was prevented from proving his case.

Despite the initial decision concerning Abdunafi's charge that the vice president's nomination was improper, and the Executive Board's findings of no evidence to support his charge, the same trial Board met again on April 11, 1973 and determined that Abdunafi had been right, that the individual holding the position of vice president had, in fact, not been in good standing for 2 years preceding this appointment and had under the constitution, been appointed illegally. The Trial Board recommended that the Executive Board take further action. Meanwhile, Abdunafi filed another charge, this one against Secretary Phillip Renna, the Executive Board and the March 23, 1973 Trial Panel, apparently for their handling of Abdunafi's charge which was heard on that day.[28] The hearing of this charge was scheduled for May 9, 1973. On that day the Trial Board rendered its decision finding that although Renna had been guilty of negligence, he should not be penalized because of illness in his family. It further found that the Executive Board and Trial Panel of March 23, 1973 were not guilty of the charges brought against them by Abdunafi. The decision included instructions that no copies of the minutes of the Trial Board's meeting were to be given out.[29] It was noted under separate

28. Abdunafi's charge is not, itself, part of the record.

29. Article XII, Section 5, 6 and 7 were cited.

cover that with regard to the charges against the Trial Board of March 23, 1973, all of the charged parties were present but that Abdunafi did not press[30] his original charges against them and so they were dismissed as unfounded.

On June 7, 1973 Abdunafi appealed the May 9, 1973 decision to the International charging that the panel had been handpicked, that it had willfully defied and violated the constitution, and demanding that the handwritten minutes of the trial panel be made available.

Abdunafi's appeal from the dismissal of his earlier charges against the entire Executive Board and his appeal of the Trial Board's decision to dismiss his charge concerning the illegal appointment of the vice president were decided at a General Executive Board meeting held at White Sulpher Springs, West Virginia during the period August 13-17, and these decisions were adverse to Abdunafi's position. Abdunafi was so advised on August 30, 1973. Abdunafi therefore, in a letter dated September 21, 1973, appealed the decisions of the General Executive Board, reviewing all the grievances, charges, appeals and supporting facts, concerning these matters and requesting permission to address the next regular convention by way of appeal as provided by the International Constitution. On September 25, 1973 Abdunafi was advised by the International that he would subsequently be advised of the dates of the next regular convention and of the time and place at which he might appear before the Committee on Grievances, Adjustments and Appeals.

On March 20, 1973 Abdunafi wrote to Robert E. Powell of

30. Abdunafi had, in the meantime, been trying to get hearings before the International in Washington because he felt that he could not get a fair trial in Newark.

the International stating that there are 125,000 blacks in the International and asking Powell where he should seek help. There is no indication in the record as to whether Abdunafi received any reply from Powell.

Through a letter dated April 3, 1973 Abdunafi was advised by the Union that charges had been brought against him by John Riggi based upon alleged misconduct on Abdunafi's part at the March 23, 1973[31] meeting at which his charges against the Executive Board had been heard. Abdunafi was advised that a hearing on Riggi's charges against him would take place on April 19, 1973. The apparent basis for the charges were allegations by Riggi that Abdunafi used foul language at the meeting during a heated argument among those present. Abdunadi denies having sworn but admits that he may have used inflamatory language. On April 19, 1973 the Trial Board held its hearing and found that Abdunafi had, as Riggi charged, conducted himself at the March 23, 1973 meeting in a manner violative of the constitution. Abdunafi was so advised by letter dated April 26, 1973 in which he was also advised that he was suspended from attendance at all regular and special meetings of the Union for 1 year commencing June 1, 1973. He was also advised that the decision would not affect, or prevent future work referrals.

Riggi testified that controversies have arisen at some meetings during which tempers get frayed, that people shout and get angry. He also testified that 4-letter words under such circumstances are not uncommon and that at the same meeting other members used improper language. Riggi attempted to make the point, however, that it was not the use of the language

31. Both Abdunafi and Riggi were in error as to the dates of this incident. Rather than relying upon their testimony, I rely on supporting documentation.

used by Abdunafi so much as it was his tone and that disciplinary action may be taken against members for swearing, depending on the tone. He stated that it is a matter of "containing the meeting in its proper perspectives" and "it is the duty of the president" to take steps to insure this because the meetings must be conducted with dignity. The president did not, however, bring charges against Abdunafi on this occasion. Rather, it was Riggi who brought charges. The record contains no evidence that anyone had ever had charges brought against him, either before or after the incident of March 23, 1973, for swearing at a union meeting, other than the charges discussed in this decision.

Despite Riggi's testimony that charges were brought against Abdunafi, not so much for the fact that he swore but because of the tone he used, I find that Riggi brought these charges against Abdunafi because of the various positions Abdunafi had previously taken against Riggi and the Executive Board and the numerous charges he brought against them, particularly his criticism of Riggi's one man control of the Union and its referral system. I base this finding on Riggi's own testimony that swearing was not uncommon at union meetings and that others had used improper language at the very same March 23 meeting, yet no one had ever previously been disciplined for swearing as had Abdunafi. I find it of particular interest that it was Riggi, rather than the president who, according to Riggi, is in charge of such matters, that brought the charges and that the Executive Board Panel found Abdunafi guilty and recommended discipline all out of proportion to the offense — a full year's suspension from all meetings. Though the internal disciplinary actions undertaken by this local against Abdunafi at Riggi's bidding are not subject to a finding of a violation, they are subject to analysis for the purpose of determining whether or not there was animus on Riggi's part and on the part of the Executive Board

in its dealings with Abdunafi. I find therefore that Riggi brought the charges against Abdunafi, and the Executive Board Trial Panel suspended Abdunafi because of his continuing efforts to undermine Riggi's control of the Union and its referral system, and that Riggi's animosity, as reflected by Abdunafi's suspension, sheds light on the subsequent events discussed hereafter.

Abdunafi subsequently appealed his suspension to the International in Washington, D.C. and asked for a hearing in Washington because he felt he could not obtain a fair hearing from the Local's Executive Board since everyone on the Executive Board depended on Riggi for job referrals. As Abdunafi pleaded in his appeal, ". . . they either fall in line or their families starve like mine." Abdunafi further urged that when an Executive Board is charged with wrongdoing, it should not then act as a trial panel. Thus, Abdunafi expanded his charges against Riggi and the Union by charging that Riggi's control of the referral system also interfered with fair and evenhanded dispensation of justice within the Union.

On May 5, 1973 Abdunafi followed up his initial appeal to the International with another, more detailed letter, attacking the system of trial procedures used at the local; his suspension; the referral system; the complete control of the Union at the local level by Riggi and his "hand picked" Executive Board, and requesting, once again, that his appeal be heard in Washington.[32] On May 8, 1973 he formally appealed the

32. Abdunafi was advised by letter dated May 9, 1973 that it is customary for the General Executive Board to delegate its judiciary authority to hearing panels in various regions for the sake of expedition. Abdunafi replied on May 4, 1973 stating that he did not want the New York panel to hear his case but rather that the General Executive Board in Washington hold the hearing. He also asked for a transcript of any hearing held in New York.

Decision

Executive Board's decision of April 19, 1973 alleging that the panel was illegal because its members were not disinterested but partial, unfair and hand picked by Riggi. He asked for a new trial at which he would present his own witnesses. He charged Riggi with retaliating against him because he had previously filed charges against Riggi. On July 19, 1973 Abdunafi was advised that a hearing on his appeals would be held by a Hearing Panel of the General Executive Board in New York on August 1, 1973. Abdunafi was invited to be present at his own expense and to submit a brief or other documents, in the alternative. Despite his appeals and other efforts, Abdunafi was suspended from attending union meetings for one year. While on suspension he did not, of course attend union meetings but both before and after his suspension he attended meetings and vociferously and untiringly pursued his goal of undermining Rigg's authority and control of the hiring system.

On July 18, 1973 Abdunafi filed new charges against the Union on the local level, this time against the May 9 Trial Panel, alleging that it was hand picked, presumably by Riggi, and again bringing charges against the entire Executive Board. On July 25, 1973 Abdunafi was advised by Recording Secretary Renna that since he had not mentioned any specific violations as wrong, and no date was specified, his charges would not be entertained.

On December 21, 1973 Abdunafi wrote a letter to Executive President Peter Fosco of the Laborers' International Union of North America, in which he outlined the hiring hall referral system as he understood it to operate at the Newark local. Specifically, he charged that 10 percent of the jobs, the best jobs were awarded outside the hiring hall; that Riggi gives the better jobs to whomever he chooses; that Riggi controls all referrals and therefore controls the membership; that other members including himself have been deprived of benefits under this

system; and that the International assists the local union in its violation of the constitution by ignoring what has been going on. Abdunafi then asked for an audience to discuss these matters. Receipt of this 3-1/2 page single spaced letter was acknowledged on January 4, 1974 with a note that it had been referred to the New York Regional Office of the Union. On January 28, 1974 Abdunafit mailed copies of this letter to the eight vice presidents of the International along with a complaint in his covering letter that he had asked Fosco not to refer his letter to the New York Regional Office but to have the International tend to the matter. On February 28, 1974 Fosco acknowledged receipt of Abdunafi's letter to the vice presidents and promised to inquire into the matter. In an undated letter[33] sometime later, Abdunafi advised Fosco that he was in receipt of Fosco's letter[34] dated April 11, 1974. In his letter, Abdunafi stated that he was shocked to have been told by Fosco that he had investigated Abdunafi's charges and found that Local #394 does not have a hiring hall or roster system and that members were permitted to seek employment on their own. Abdunafi went on to complain about being out of work and deprived of welfare and pension benefits as a direct result of the illegal referral system. After reviewing the problems with the way the hiring hall system was run, Abdunafi registered an objection to Fosco telling him that he should seek his own employment. Abdunafi then complained that the local was corrupt and that the business manager only represents 10 percent of local laborers and gets the better jobs

33. The letter was allegedly postmarked September 10, 1974 according to a communication from Fosco to Abdunafi's dated October 9, 1974.

34. Not included in the record. Once again the description of the content of Fosco's letter as described in Abdunafi's letter is noted, not to show what Fosco's letter allegedly contained nor for the truth of matters contained in Abdunafi's letter but rather to show that Abdunafi registered his displeasure in this and other letters as to how the Union operated under Riggi's direction.

for his own people. Abdunafi complained further that he could not obtain work because stewards and foremen would only accept laborers with slips signed by Riggi. Abdunafi closed with a request for an audience. Receipt of Abdunafi's letter was acknowledged on October 9 by Fosco who once again advised him that it had been forwarded to the New York Regional Office.

On December 23, 1974 Abdunafi wrote to Fosco once again enclosing clippings[35] from the Elizabeth Daily Journal of the same date. He advised Fosco that it was Fosco's job to depose Riggi and see to it that a fair and impartial hiring system was installed. He told Fosco that he had not received a reply to his last letter and took the step he did with great reluctance because he was forced to do so under the circumstances. Abdunafi was apparently referring to his filing of charges against the Union with the National Labor Relations Board on December 12, 1974.[36] He had previously filed charges against the Union with EEOC in October 1974. Fosco acknowledged receipt of Abdunafi's letter on January 2, 1975.

On July 1, 1975 Abdunafi filed the charge in the instant proceeding. The charge was discussed at union meetings by Abdunafi and by the Union leadership. The Union leadership maintained that the filing of the charges with the Labor Board put the Union under a financial strain and that they could not tell what the total cost would be because they did not know how long the matter would be in issue. In particular, attorney's fees were discussed, and certain sums of money labeled as attorney's fees and apparently received by the business agent for that use was questioned by Abdunafi.

35. Not included in the record.

36. Dismissed February 21, 1975.

Decision

Even after filing the unfair labor practice charges against the Union in late 1974 and 1975 Abdunafi pursued his objective of getting the hiring hall referral system changed through internal means. On September 27, 1975 he once again filed charges personally against Riggi for "unfair hiring practices." The matter was tabled, however, "until such time as the National Labor Relations Board has reached a decision on similar charges," according to a letter dated November 4, 1975 addressed to Abdunafi and signed by Recording Secretary Urso.

On October 14, 1975 Abdunafi wrote a letter to Secretary of Labor Dunlop briefly outlining a number of the various grievances which he had previously brought to the attention of the Local Union, International, National Labor Relations Board and other entities. There is no evidence, however, that this letter ever came to the attention of the Union.

Abdunafi's crusade against Riggi and the Union's leadership continued throughout 1976 and 1977. In June 1976 Abdunafi contacted President Angelo Fosco of the International to ask about his being on the agenda at the forthcoming convention. He mentioned, once again, Riggi's alleged wrongdoing, the retaliation which he claimed to have suffered for the 5 years since he first filed charges against Riggi and requested a personal audience with Fosco before the convention to discuss the matter. Subsequently, Abdunafi received a letter from the General Secretary-Treasurer of the International advising him that he would be advised of the time and place just as he had been in 1973 when he first appealed from the General Executive Board decisions. Eventually, Abdunafi received word that his appeal would be heard by a trial panel at the convention in Miami on September 13, 1976.

Decision

On October 15, 1976 Abdunafi filed charges with the Department of Labor under the Labor Management Reporting and Disclosure Act concerning reimbursement of Riggi from the Union's treasury for $12,500 in attorney's fees which Abdunafi alleged were personal in nature and which reimbursement would therefore be illegal. Abdunafi alleged that the reimbursement was voted by a simple show of hands and that this too was illegal. He alleged, further, that an increase in dues was voted without a secret ballot in violation of the statute; and that $1,000 was extracted illegally, apparently to send delegates to the forthcoming convention, again without a secret ballot. These matters had been discussed, according to sketchy testimony, at a union meeting in early October and resulted in heated debate.

Under separate cover, by letter of the same date, Abdunafi also wrote a letter to the Secretary of Labor requesting that an injunction issue restraining the business manager from sending anyone to work until his problems were resolved. In his very lengthy letter Abdunafi charged that the International was covering up and condoning the breach by the Local Union of its constitution. He alleged that at the convention in Miami, at his hearing, two of the panel members were the same individuals to whom he objected when they sat on the Trial Panel in the New York Regional proceeding. He argued that this was "tantamount to the accused sitting in judgment of themselves." He charged that the Miami panel recommended dismissal of his *bona fide* charges, that breaches of the constitution by the local resulted in monies being improperly extracted from the treasury and in the improper election of ineligible local officials. He complained that his charges were not properly presented and called into question the practice of the local of failing to follow proper protocal. He thereafter discussed, at length, the various problems previously brought to the attention of the International including the business manager's complete control

of the local union through his authority to unilaterally refer out individuals of his choosing and the alleged "improper extraction of $1,000" for the use of the alternate delegates to the 1971 convention.

Finally, Abdunafi criticized Riggi for the financial hardships which he alleged he suffered because of Riggi's failure to refer him to jobs in retaliation for the charges which he had brought against Riggi. Along with the explicit charges contained in Abdunafi's letter of October 15, 1976, he also enclosed several copies of earlier letters which included similar or related charges and allegations.

On November 23, 1976 Abdunafi brought new charges based upon occurrences which allegedly took place during a meeting of the Local Union on November 5, 1976. He charged Recording Secretary Urso with falsifying the minutes of that meeting by not including therein a reference to Abdunafi's conversation with an attorney concerning the reimbursement of Riggi out of treasury funds for attorney's fees amounting to $12,500. Secondly, he charged the President of the Local Union with failure to properly conduct the meeting because he did not ask Abdunafi why he objected to adoption of Urso's minutes. Finally, he charged the entire Executive Board, except for Vice President Carrington,[37] with complicity along with the recording secretary and president for permitting minutes to be adopted which did not properly reflect what had occurred at the meeting. Abdunafi then charged a conspiracy among those named in his charge to have the lawyer brought to the meeting "to brainwash the membership into allowing $12,500 to be extracted illegally from the treasury." Abdunafi contended that the legal expenses

37. Carrington has asked that Abdunafi's reasons for objecting to the adoption of the minutes be noted but his request was ignored.

were the result of Riggi's errors and therefore not reimbursable, but added that he might not have objected to the reimbursement of Riggi if it were not for the fact that Riggi personally controlled the entire referral system and "had the power to decide if a man eats or starves," and therefore effectively controlled the vote in favor of reimbursement. In conclusion, Abdunafi drew a comparison between himself and certain others who were bearing the hardships of unemployment because of their defiance of Riggi and those who supported him and his control of the Union through his singular authority over the referral system. Abdunafi demanded that his charges be read to the membership at the next regular meeting.

On January 4, 1977 Recording Secretary Urso advised Abdunafi that the charges which he had filed on November 23, 1976 were scheduled for hearing on January 24, 1977. In the same letter Urso also advised Abdunafi that countercharges had been brought against him, copies of which were enclosed, and that the countercharges would also be heard at the same trial board meeting. The countercharges against Abdunafi were brought by the members of the Executive Board, individually and as a body and accused Abdunafi of "defaming and slandering the Recording Secretary with an accusation of minutes falsification" and by "alluding that a conspiracy existed between the various members of the Executive Board . . . and separately the business manager and an attorney . . . to illegally extract money from the Union's treasury." Abdunafi's charges of minutes falsification and conspiracy were considered to be, under the countercharges, defamation and slander and therefore violative of the Local Union Constitution.

On January 26, 1977 the Trial Board issued its report on the January 24, 1977 hearing on Abdunafi's charges and on the countercharges filed against him. The Trial Board found all of

Decision

Abdunafi's charges to be without merit and all of the countercharges against Abdunafi to be meritorious. The Trial Board decided unanimously that Abdunafi should be suspended from attending all regular and special meetings for 2 years. Although none of the individuals charged by Abdunafi served on the January 24, 1977 Trial Board, one of those who served on that Board, Timothy Nickles, testified that he was appointed to the Trial Board by the President of the Local Union, Jack Merlo. It must be assumed that the procedure for choosing individuals to serve on Trial Boards is a regular, ordered procedure done in accordance with established rules. Therefore, it may safely be assumed that the other members of the January 24, 1977 Trial Board, like Nickles, were all chosen to serve on that Board by Merlo or by the Executive Board of which he is a member. Thus, in either case, as Abdunafi was later to complain, the charged parties, i.e. Urso,[38] Merlo and the rest of the Executive Board chose their own judges to decide their own guilt or innocence with respect to the charges brought against them by Abdunafi as well as the guilt or innocence of Abdunafi with respect to the countercharges brought against him by the members of the Executive Board, individually and as a body. In light of the inequities of the procedure utilized, the ultimate decision was not surprising. Abdunafi appealed to the International on procedural grounds and charged that his suspension was retaliatory. The battle continues.[39]

Although it is not the province of the undersigned to judge the internal functioning of a labor organization to determine whether it is democratic or otherwise and although the Supreme Court, as noted above, has counselled against the National Labor Relations Board attempting to take an affirmative role in,

38. Urso was also a member of the Executive Board.

39. New charges against the Union were filed in late 1977.

or getting too much involved in establishing internal union procedures, the Charging Party, in his 8 year old crusade has attempted to show that placing in the hands of one individual the sole authority to control the hiring hall referral system permits that individual to dictate who will be able to support himself and his family, and if that individual has the power to feed or starve those who are dependent on such a system, he likewise effectively controls those who serve on the various committees and boards upon whom the membership depends to adjust grievances and dispense justice. Without deciding the correctness of the decision of the January 24, 1977 Trial Board, I find that the entire congeries of events beginning in 1971 and culminating in the January 24, 1977 Trial Board decision amply demonstrates the credibility of Abdunafi's hypothesis that the placing in the hands of one individual the sole power to regulate an exclusive hiring hall system, without the utilization of objective criteria or standards, has consequences more far-reaching than the occasional denial of a particular job to a person out of favor with that authority and permeates the atmosphere with such potential for abuse that the organization dependent upon the proper functioning of that hiring hall system cannot effectively operate to serve its membership or other interested parties.[40]

40. As noted above, Abdunafi, in his many appeals and letters to the International and to government bodies charged that the Executive Board could not operate in an independent manner free of Riggi's authority because they were dependent on Riggi for their livelihood. Without concluding that the Executive Board which brought countercharges against Abdunafi in 1977 was in any way influenced by the amount of work they were referred to by Riggi, as claimed by Abdunafi, the record reveals that in 1975, (the only year for which adequate records were provided) of the five members on the Executive Board besides Riggi and his assistant Corsentino, all worked in excess of 1,100 hours, twice the average worked by other members of the Union that year. Although this does not, in and of itself, prove that Riggi controls the Union by controling the referral system, it does, once again, indicate that the lack of visible objective standards creates a situation where there could be abuses and, moreover, abuses which could not be detected without such standards.

Decision

Although the primary purpose in describing in such minute detail the course of Abdunafi's 8 year battle with Riggi and the Union hierarchy is to demonstrate beyond question Abdunafi's protected concerted activity in trying to undermine Riggi's control of the hiring hall system, and to illustrate by means of describing the various actions taken in retaliation against him, the fact that animosity existed and exists because of these activities, an overall complete understanding of the sequence of events in Abdunafi's case is also necessary in order to comprehend the tremendous extent to which an individual worker's Section 7 rights to freely engage in protected concerted activities can be actually or potentially limited by placing in the hands of one individual or group of individuals complete dictatorial control of a hiring hall system without the protection of workable objective criteria or guidelines to immunize those who are dependent upon such a system for their livelihood from the actual or potential abuses which may be occasioned by the use of irrelevant, unfair or invidious considerations in the dispensation of job referrals. Although only a few individuals or even no one at all may suffer actual financial setbacks if an exclusive hiring hall referral system without objective guidelines is operated in a fair and just manner, the potential for abuse in such a system is all too pervasive and cannot help but serve as a warning to those individuals dependent on the system that it is far more important to curry favor with those in power in order to ensure ones income than to dedicate one's self to the fair, proper and effective operation of the organization and its hiring hall for the benefit of all who are dependent upon it for a livelihood.

(b) *Failure to Refer Abdunafi*

The record reveals that the Union refers individuals to jobs in 3 ways. First, an applicant for referral may report to the

Union hall where Riggi or one of his assistants might choose to refer him to a job upon receipt of a request for laborers from a contractor. Secondly, Riggi occasionally receives emergency requests from contractors on weekends or after hours for laborers to be sent out to the jobsite. On these occasions Riggi calls up certain individuals and refers them directly to the job without going through the hiring hall procedure. Finally, sometimes a request will be called in by a contractor, superintendent, foreman or steward requesting permission to hire a particular individual for a job. Riggi frequently grants such requests.

When it comes to appointing stewards, Riggi would most frequently learn of new job opportunities during pre-job conferences with contractors. After Abdunafi and Adolph Farmer[41] began their compaign in 1970 against Riggi's control of the referral system, Riggi did not thereafter call Abdunafi or Adolph Farmer to appoint either of them to stewards' positions nor contact them in the evenings nor on weekends to work on emergency jobs. For these jobs Riggi would usually call those members with whom he was most familiar. When Riggi learned of new long term jobs opening up, he usually contacted stewards or, again, those individuals, the names of whom Riggi was most familiar. Though prior to 1971 both Abdunafi and Adolph Farmer were among this select group, Riggi did not call them thereafter when he heard that new good job openings would be coming available in the near future. Rather, individuals close to Riggi such as Joseph Corsentino and Art Carrington obtained stewards' or foremens' jobs, and according to the testimony of both, when they worked, it was almost exclusively as steward or foreman, particularly in 1976 and 1977. Similarly, the testimony

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41. Discussed *infra*.

indicates that officers of the Union work steadily and more often as stewards or foremen than do rank and file applicants for referral.

With reference to referrals out of the hall, Riggi testified that the Union Hall is opened at 4:30 a.m.[42] by one of the members who is assigned this duty. Job applicants are sometimes waiting in their cars for the hall to open and since the initiation of the sign in procedure in September 1977 have signed the roster, noting the time they first arrived. According to all witnesses other than Riggi, the hiring hall opens at 6:30 a.m. Prior to September 1977[43] the time of arrival at the hall was not considered when referrals were made, so it is doubtful that anyone would bother to come as early as they did later, with the initiation of the roster system. I conclude therefore, though the record is not that clear, that prior to September 1977, the hall opened at about 6:30 a.m. and thereafter, it opened at 4:30 a.m. as Riggi testified.

Riggi would usually arrive at the hall between 6:a.m. and 6:30 a.m. and remain there till 8 a.m. or 8:30 a.m. at which time he would leave. While at the hall Riggi would receive requests for laborers, go out into the hall, call individuals by name and issue referral slips to whomever he chose to send to work. After Riggi left the hall, his assistants, John Corsentino and Chris Renda would be in charge of issuing referral slips. The hall closed at about 9:30 a.m.

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42. The sign in sheets bear out Riggi's testimony but reflect that individuals did not begin to sign in at very early hours until several weeks after the initiation of the sign in system in September 1977.

43. Hereinafter the discussion will concern the system of referral used prior to September 7, 1977 unless otherwise indicated.

Decision

Wakil Abdunafi, who had been a member of the Union for 9 years, testified that he shaped up regularly at the union hall, more often than others. Some other witnesses testified to the fact that Abdunafi shaped up regularly while still others stated that sometimes he was there, sometimes not. Riggi testified that Abdunafi did not show up consistently and that he would see Abdunafi at the hall only once every 2 or 3 weeks. On cross-examination, however, Riggi admitted that Abdunafi might have been present in the hall a number of times when Riggi did not notice him and that Abdunafi might have shaped up more often than once every 2 or 3 weeks. Riggi further testified to having been absent from the hall for extended periods due to illness and other personal involvements. From the totality of testimony of all witnesses I conclude that Abdunafi shaped up at the hall on a fairly regular basis.

Riggi testified that the best time to report for referral is at 6:00 a.m. and that Abdunafi did not arrive at the hall until between 7:45 a.m. and 8:30 a.m., rarely before 8:00 a.m. Riggi stated that 7:45 a.m. to 8:00 a.m. was the latest an individual could report and still expect to get referred to a job and that 8:00 a.m. was, ordinarily, starting time on the job for laborers. He testified that one of the reasons that Abdunafi was not referred out was because he did not report consistently to the hiring hall and when he did, he was late.

The weight of testimony of other witnesses tends to support Riggi insofar as he claimed that Abdunafi did not arrive at the hiring hall early. Thus, Nick Farmer testified that in the previous 2 or 3 years he regularly reported to the Union hall, getting there at 6:30 a.m. to report to the job at 7:00 or 7:30 a.m. He testified that he never saw Abdunafi at the union hall at 6:30 a.m. Renious Edwards testified that Abdunafi would arrive usually between 7:00 a.m. and 8:00 a.m. I find that Abdunafi, when he

shaped up, arrived, as Edwards credibly testified, neither very late nor very early. But Abdunafi testified that regardless of when he arrived, other laborers who shaped up after he did, were nevertheless sent out before him, intimating that certain individuals were referred out because of their relationship to Riggi, regardless of whatever time they arrived at the hall, even though Abdunafi was already there, ready, willing and able to work if he got the job. He testified that in over a hundred instances he was there in the hall ready to go to work when people who arrived later than he did were referred out while he remained behind. Abdunafi's testimony was supported by other witnesses. Thus Resbeth "Nick" Farmer testified that men were referred to jobs from the hall as late as 8:00 a.m. and that when he was a steward on certain jobs, he called in for additional laborers as late as 8:30 or 9:00 a.m. He further supported Abdunafi's testimony by stating that it did not matter if an individual arrived first at the hall or not because Riggi picked whomever he wanted to refer regardless of time of arrival. Jonathan Ruth testified that he shaped up in 1975, arrived at the hall between 7:35 and 8:00 a.m., and witnessed other individuals who arrived at the hall after Abdunafi, being referred out to jobs while Abdunafi remained behind. Renious Edwards credibly testified that he too, on a number of occasions, witnessed Abdunafi remaining behind while other individuals who arrived later were referred out.

Abdunafi testified that once he arrived at the hiring hall he would usually stay there waiting for referral until the hall closed. After Riggi left for the day, Corsentino and Renda were in charge of referrals, and although they referred individuals to jobs as late as 9:00 or 9:30 a.m., they never referred Abdunafi to any job.

Decision

From the testimony of Abdunafi and other witnesses I conclude that the time that Abdunafi arrived at the hall was not a consideration in the failure or refusal of Riggi to refer him to jobs because whether he arrived before or after other individuals, the others were referred out before him. Respondent's reliance upon this factor as an excuse for failing to refer Abdunafi is clearly an afterthought.

Though Abdunafi had been a member of the Union for many years before, he began receiving steady referrals through the hiring hall in 1966. From 1966 through 1970 he worked 1093, 489, 906, 858 and 1256 hours. As noted above, it was in 1969 and 1970 that the relationship between Riggi and Abdunafi began to deteriorate. Though Abdunafi was referred to a job as late as December, 1970 and was referred out again in January 1972, working 1,207 hours that year, there is no record of any referrals during 1971 though, according to Riggi, the construction industry was well off economically in the early 70's. The personal feud between Riggi and Abdunafi, in particular the questioning by Abdunafi of the right of the Union to refer out pensioners to better jobs began sometime in 1970 and culminated in Abdunafi's charges filed on May 28, 1971. If Abdunafi's failure to work in 1971 can be attributed to his dispute with Riggi and the Union hierarchy, it must be attributed to the activity in which he participated in 1969 and 1970 since his referrals ceased as of December 1970, long before he filed his first internal charges against Riggi on May 28, 1971. Indeed, Abdunafi testified that he received no referrals either before or after his filing of the charges against Riggi. Clearly, if he was denied referrals immediately prior to the filing of those charges, those charges were obviously not the particular occasion for discrimination. More likely, the argumentation which occurred prior thereto at the Union meetings was the reason why Abdunafi received no referrals whatsoever in 1971.

Decision

Though Abdunafi continued to actively pursue his campaign against Riggi and the Union hierarchy throughout 1971, 1972 and 1973, the Union, beginning in January 1972 once again began to refer him to jobs and in that year he again worked in excess of 1,200 hours. Though not entirely free from doubt, it would appear that Abdunafi's appeal and numerous letters to the International which began late in 1971 brought about his once again being referred to jobs in 1972. In any case, there being no other explanation as to the reason for the sudden change in Riggi's policy concerning Abdunafi's referral,[44] I find that his failure and refusal in 1971 to continue to refer him to jobs as in the past was due to the internal friction which developed between them because of Abdunafi's vociferous objections to Riggi's control of the hiring hall system and other policies practiced by Riggi and the Union.[45] Moreover, though

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44. Riggi testified that he did not discriminate against Abdunafi in the 1970's and that Abdunafi did not work as much as he could during these years because he did not shape up consistently, he did not shape up early enough, he refused jobs to which he was referred and because certain contractors did not want Abdunafi working for them. I have already found that Abdunafi did, in fact, shape up fairly regularly and that whether he reported early or late had no bearing on his failure to be referred because other individuals were referred out in preference to him even when they arrived at the hiring hall after he did. With regard to his refusing particular jobs, Respondent offered no evidence and its witnesses described no particular incidents wherein Abdunafi was supposed to have rejected any jobs offered to him prior to 1975. I find, therefore, that no referrals were made to Abdunafi in 1975 and he refused none. Respondent's contention that Abdunafi was rejected by certain contractors was not adequately supported by the evidence.

45. In Respondent's very able brief, counsel notes that in a letter dated August 9, 1971 Abdunafi stated, "I have been out of work for quite a while due to an accident on the job." Respondent argues in its brief:

> It is thus clear that in his [later] letter to Ford, [not in

(Cont'd)

(Cont'd)

> record] Abdunafi was attempting to buttress his case with the Board by stating that he did not work in 1971 because he filed an intra-union charge. When he wrote the 1971 letter, however, three years before filing the charges with the Board, he thus set forth the truth, i.e., that he did not work in 1971 because he was injured.

Respondent thus argues that Abdunafi used his 1971 loss of employment as an afterthought to support his later charges. I do not, however, read the evidence as does Respondent. The reference to the injury in the August 9, 1971 letter does not state that the injury occurred in 1971 nor that Abdunafi's reference to being "out of work for quite a while due to an accident on the job" necessarily refers to any loss of work incurred in 1971. On the contrary, Abdunafi credibly testified that the injury and concomitant loss of work to which he referred in the August 9, 1971 letter occurred back in 1969. The Union records indicate that Abdunafi worked fewer hours in 1969 than he did either the year before or the year after and thus, to some degree, support his testimony. Abdunafi, may well have included in his letter of August 9, 1971 to the International, a reference to his earlier loss of employment due to injury merely to emphasize his adverse financial condition. Moreover, elsewhere in the letter Abdunafi states:

> I am looking for some constitutional modifications that will afford better protection of my rights as well as those of others . . .
>
> A roster would afford some protection. It would also guarantee that dues paying members with books have jobs before non-bookmen and college boys were sent on jobs.

Along with the August 9, 1971 letter to the International Abdunafi enclosed a copy of his May 28, 1971 charges against John Riggi.

These charges state:

> I have been out of work for six months and other men have been put to work several times during this period.

(Cont'd)

Decision

Abdunafi, in 1970 and prior thereto, had on occasions been appointed by Riggi as steward and foreman on certain jobs, from 1971 on he never again received such appointments.[46] Jobs as foreman or steward were particularly prized since foremen were guaranteed a 40-hour week and received premium pay while stewards were, by contract, always the last man to leave the job. For lack of any explanation as to why Abdunafi was no longer referred to any job as foreman or steward after 1970, I must conclude that it was due to the fact that Riggi was in sole control of such appointments and no longer enjoyed a comfortable relationship with Abdunafi. The record is clear that Riggi was responsible for the referral of all stewards and some (non-company) foreman and admittedly appointed the same individuals to these positions with great frequency. When his relationship with Abdunafi deteriorated, he no longer desired to have Abdunafi act as steward on the job and so no longer appointed him as such. His failure to refer Abdunafi either as steward or as laborer in 1971 after having done so previously, following fast on the heels of the breakdown in the relationship

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(Cont'd)

> Approximately 40 new members have been brought into the local and given jobs, and I was not considered once. It seems only a certain few qualify for the better jobs. I feel that a new system of hiring from the hall is a must.

Thus, a fair reading of the August 9, 1971 letter together with the enclosed charges of May 28, 1971 makes it clear that Abdunafi was complaining at the time that he was not being referred to jobs because of the way Riggi controlled the referral system. Respondent's position that Abdunafi did not work in 1971 because of an injury is untenable as is its position that Abdunafi's claim of discriminatory motivation was an afterthought utilized to buttress his charges with the Labor Board filed several years later.

46. On one job, Abdunafi was the only laborer and for this reason did the paper work usually done by the steward.

because of Abdunafi's dispute with Riggi and the Union leadership over internal union policies indicates a discriminatory cause and effect, as well as the existence of animosity harbored by Riggi toward Abdunafi. The proscriptions of Section 10(b), however, prevent any findings of violation with regard to the 1971 failure to refer but the evidence of animosity to be drawn from the failure to refer in 1971 is available as background information to support any later findings.

According to Union records received into the record by stipulation, Abdunafi once again began to work under the jurisdiction of the Union in January 1972, shortly after he complained to the International about Riggi, and worked for a total of 1207 hours that year according to these records. Abdunafi conceded that he worked in excess of 1,200 hours in 1972. These jobs varied in length from 1 to 2 days to one which lasted for 725 hours from August through December. Abdunafi protested short jobs of 1 or 2 days or 1 or 2 weeks and testified that the long job was obtained by him through Nick Farmer, who was foreman on the job. He conceded, however, that all work in the Union jurisdiction was obtained directly or indirectly through Riggi. Riggi testified with regard to the 7 jobs listed on the Union document stipulated into the record, at which Abdunafi worked in 1972, that he referred him to almost all of them. I credit Riggi's testimony. Riggi testified also that during the early 70's he offered Abdunafi jobs which he refused. Abdunafi admitted that he protested receiving jobs of short duration but denied that he ever refused referrals for this or any other reason during this period. With respect to this testimony I credit Abdunafi, particularly in light of the fact that the record indicates that Abdunafi worked on several jobs of short duration in 1972 and Nick Farmer testified that he never heard Abdunafi refuse work.

Decision

Although the 1,207 hours worked by Abdunafi in 1972 compares well with the 1,133 hours worked by the average member, according to the documents received into the record, John Corsentino, who was in part responsible for their preparation conceded that some members may have worked a great deal more than others and this is obviously quite true since even members who worked just a few hours or who did not work at all were averaged in to the figuring. Similarly, a document received into the record which indicates that all laborers working in the Union jurisdiction, both members and nonmembers together, worked on an average of 1,251 hours in 1972, is not of inestimable value since it includes the total number of people who worked in 1972 regardless of how few hours they worked or desired to work. Corsentino testified that the lists include students who perhaps worked only a few hours, other individuals who chose to work only for a day or two, still others who work only when their unemployment runs out as well as steady employees who work regularly. The figures are thus useful in comparing the hours worked by Abdunafi, with the "yearly average hours per man" as appears on the documents, but useless as a basis for determining whether Abdunafi was treated fairly compared to other individuals who sought employment as regular or steady employees.[47] For, if an individual is ready, willing and able to work a 40-hour week for 52 weeks a year, and by the grace of the business manager is referred out to the choice jobs so that he does, in fact, work those 2,080 hours, that number of hours when added to the number of hours worked by one summer student, perhaps 20 hours, would average out to 1,050 hours per each man. It is the essence of Abdunafi's complaint that he is ready willing and able to work full time as a steady employee and has been denied that

47. Respondent's own witnesses testified that regular employees work in excess of 2,000 hours per year.

right by Riggi because of discrimintory reasons. Neither Abdunafi nor the General Counsel concede that justice is served by Abdunafi's having received the average number of hours, calculated by dint of the questionable calculations employed in synthesizing the documents furnished by the Union in order to bolster its arguments. General Counsel argues that Abdunafi should be considered as a ready, willing and able applicant for referral who reports regularly to the hiring hall and thereby deserves to be referred out to a sufficient number of jobs and hours to permit him to make an adequate living. Assuming, at this point, for the sake of argument, that Abdunafi did report regularly to the hiring hall, and this I have found, and was ready willing and able to work, as I have not yet determined, I must agree with General Counsel that the entity entitled "yearly average hours per man" calculated by adding all of the hours worked by individuals who desire full time employment to all of the hours worked by those who do not, should be given no consideration and rejected as irrelevant.

As noted above, Abdunafi continued his running battle against Riggi, his control of the referral system and against the Union's Executive Board throughout 1972 and 1973, filing charges against them and appealing their decisions through numerous communications with the International. In 1973 he broadened his attack to include as a target, the New York Regional Office of the International, and appealed one decision of the General Executive to the next forthcoming regular convention. It was in 1973 also that Riggi brought charges against Abdunafi which resulted in his suspension, action which I have found indicative of the existence of animus, though, of course, not violative of the Act.

In 1973, while the battle raged, the number of hours worked by Abdunafi dropped to less than half of those worked the

previous year. That year he worked on 7 jobs amounting in total hours to 519-1/2, 122-1/2 of which were on the one big job which he had obtained the previous year through Nick Farmer. The yearly average hours per man working out of the Local Union, however, remained fairly constant, when compared to 1972, over 1,000 hours. Clearly, for whatever reason, the number of hours worked by Abdunafi had again dropped disproportionately as compared to those worked by him the previous year and by other "average" workers both in 1972 and 1973. The jobs worked by Abdunafi in 1973 consisted of 3 jobs lasting 2 days each and 3 jobs lasting from 2 to 4 weeks each. All work was obtained again directly or indirectly through Riggi[48] who maintained complete personal control over the referral system despite Abdunafi's efforts. Although it is clear that whatever work Abdunafi obtained in 1973 was through Riggi, it is not clear how much work he should have received if the hiring hall were operated through the utilization of a referral system based upon objective criteria and guidelines to ensure a fair and impartial distribution of available work. Once again Respondent argues that Abdunafi did not work in 1973 because he did not want to work. Abdunafi alleges that he was ready, willing and able to work but was skipped over by Riggi who made his referrals on the basis of unfair considerations. Evidence in depth[49] concerning specific incidents which may or may not have

48. Riggi testified that he referred Abdunafi to 5 of the jobs which he obtained in 1973.

49. Riggi testified that Abdunafi was fired from one job and quit another in 1973. Supporting testimony from the contractors was not, however, presented nor was there any satisfactory reason given for not presenting supporting witnesses. I therefore give no weight to Riggi's testimony concerning Abdunafi's being fired from one job and quitting another in 1973, insofar as such may reflect upon Abdunafi's desire to be employed during that period. Carrington's brief testimony on the subject was too skeletal to be of value.

occurred in 1973, bearing on the subject of Abdunafi's job assignment in that year, were not offered by either Respondent nor by General Counsel presumably because any findings of violations in 1973 would have been barred by Section 10(b). However, for background purposes I would tend to accept as more probable, Abdunafi's description of what occurred than that of Riggi. After all, Abdunafi had been waging the battle against Riggi's personal control of the referral system for years and had complained vociferously in person and in innumerable pieces of correspondence about how he and others had been victimized by Riggi's failure to refer them to jobs. I cannot believe that Abdunafi continued to wage his battle for a reformed referral system, complaining so bitterly about Riggi's failure to refer him, while all the while, according to Riggi, he did not want to work at all. Abdunafi's testimony to the effect that he was always ready, willing and able to work but that Riggi simply would not refer him out is far more consistent with the facts. Riggi stated that Abdunafi refused jobs that were offered but the record indicates that of the six jobs which he obtained in 1973, 3 were for only 2 days each. If, as Riggi contends, Abdunafi refused jobs and would not accept jobs expected to run for only short periods of time, why would he accept those 3 2-day jobs? I find that the weight of the evidence indicates that Abdunafi continued throughout 1973 to report for shape up fairly regularly in an honest attempt to obtain employment and did not refuse any jobs offered to him but that he was referred to far fewer jobs than he had in the past. I further find that inasmuch as the amount of work available in 1973 was substantially equivalent to that of the previous year and the average hours worked by individuals referred out of the hall remained about the same in 1973 as in 1972 while Abdunafi's hours decreased substantially, Riggi's failure to refer Abdunafi was caused by his passing over Abdunafi in favor of other individuals. I also conclude that in light of Abdunafi's

demonstrated untiring efforts to undermine Riggi's control of the referral system and the animosity reflected by the Union's and Riggi's decision to suspend Abdunafi in retaliation for Abdunafi's filing of charges against Riggi and the Executive Board, the refusal to refer Abdunafi to jobs which were available and to which Abdunafi was ready, willing and able to be referred was discriminatory and but for Section 10(b) would be found violative of the Act.

As above noted, throughout 1974, Abdunafi continued to battle Riggi's control of the referral system, writing letters to the International about alleged abuses and charging the International with ignoring the situation. He complained of the deprivation he suffered because of the situation. When told by the International that there were no abuses nor any referral system in effect and that he ought to seek employment on his own, he sought personal audience with the International. He was advised that his request had been forwarded to the New York Regional Office of the International, an agency which Abdunafi had already complained about.

During 1974, while Abdunafi continued his battle against the Union, Riggi and the referral system which he was trying to reform, he continued to shape up, seeking employment through the very system he was attacking, just as he did in 1973. Again, he received no referrals as steward[50] or foreman but did work for a total of 1,017 hours, including some referrals of 1 or 2 days but

50. The previous year he performed the duties of a steward on one job where he was the only laborer present and therefore the only one who could perform such duties. Though there is testimony in the file to the effect that Abdunafi was shop steward in 1974, this is apparently an error, for the only shop steward reports in the record which were signed by Abdunafi are dated 1973. The date 1974 was mistakenly supplied by the cross examiner in his question and was apparently overlooked by Abdunafi in his reply.

others of a much longer, significant and satisfactory duration. In 1974 Abdunafi worked for seven different contractors. He obtained these jobs through the Union, but the longer jobs were gotten through the assistance of Nick Farmer who was either steward or foreman on these jobs and who intervened successfully on Abdunafi's behalf to get him referred. Nevertheless, all referrals were only possible if Riggi or his assistants consented, which they did. Although Abdunafi's hours were approximately the same in 1974 as the average hours per man, he maintains that he was still being passed over by Riggi and that the choice jobs, steady jobs and those lasting for a year or two were being given by Riggi to others whom he favored. Riggi testified that in 1974 he referred Abdunafi to about five jobs but admits that during the years 1971 through 1975 when he became aware of a particularly good job through participation in pre-job conferences he did not tell Abdunafi about it, nor did he tell Abdunafi when he learned in advance that there would be a steward's job opening up. Rather, Riggi would advise his stewards when certain choice jobs were coming up. They would work more than other individuals and, grudgingly, Riggi admitted that certain individual's kept reappearing as stewards and as foremen, Urso, Renda, and Carrington among others. The essence of Abdunafi's complaint is that after 1970 other individuals, those in Riggi's favor, received jobs as foremen and stewards and as such obtained the best referrals while Abdunafi was not so chosen. Riggi's testimony fairly well supports Abdunafi's contention. Although Riggi testified that Abdunafi refused jobs in the early 70's, apparently referring to 1974 as well as earlier years, no evidence concerning any particular refusal was offered and in light of the fact that Abdunafi accepted one 1-day job and one 2-day job in that year, I credit Abdunafi over Riggi and find that Abdunafi did not refuse any job referrals in 1974.

Decision

Abdunafi's last job in 1974 came to an end in October of that year. In that month he filed charges with the Equal Employment Opportunity Commission and on December 12, 1974 he filed charges with the National Labor Relations Board alleging that the Union caused Clayburn Construction Company to lay him off because of his intra-union activities and that the Union operated its hiring hall in a manner which discriminated against applicants who were not friendly with its business agent. The Regional Director of the 22nd Region of the National Labor Relations Board on February 21, 1975 refused to issue a complaint based on Abdunafi's charge and on April 25, 1975 his appeal was denied.

Abdunafi, as noted above, continued to speak out against the policies of Riggi and the Union hierarchy and their policies throughout 1975. Over and above the criticism of union policies which resulted in heated arguments at union meetings, the unfair labor practices filed by Abdunafi were also discussed.

Despite the animosity which existed between Abdunafi and Riggi, the internal charges and the filing of the unfair labor practices, Abdunafi continued to shape up at the hiring hall, and though he reported to the hall later[51] than some individuals, he

51. Robert Farmer testified that Abdunafi shaped up the majority of the time, arrived between 8:00 and 8:30 a.m. and that Riggi referred applicants to jobs between 6:30 and 7:00 a.m. but also after 8:00 a.m. as did Corsentino and Renda. Timothy Nickles testified that Abdunafi shaped up, but usually arrived after 8:00 a.m., after most referrals had been made which was between 6:00 a.m. and 7:30 a.m. John Corsentino, at one point, testified that Abdunafi shaped up only about 40 percent of the time, most of the time after 8:00 a.m. Elsewhere, Corsentino testified that the majority of the time he did not know what time Abdunafi reported for work and sometimes did not notice whether or not he was there at all. I found Corsentino's testimony unreliable on this point. Corsentino admitted that he never referred Abdunafi to any job. Abdunafi explained credibly that whereas he used to report to work early, when it became clear that he would not be referred out anyway, he began to report at a more reasonable hour.

also reported earlier than many other applicants for referrals who were referred out while Abdunafi was not. Though Abdunafi named 15 specific individuals who, he testified, were among over 100 persons who fit into this category in 1975 and thereafter, none of them were called by Respondent to deny this allegation. Abdunafi also testified that individuals who had just come off jobs were immediately sent out again on new jobs while he "just sat there". Abdunafi named individuals in this category and none took the stand to deny it. Indeed, the Union's records clearly reflect that Abdunafi did not work in 1975 at all, whereas many other individuals were referred out to 5, 6, 7 or more jobs in that year.

Adolph Farmer supported Abdunafi's testimony by stating that Abdunafi reported for shape up regularly in 1975 and remained at the hall until it closed at 9:30 a.m.

Though Abdunafi continued to shape up at the hall on a fairly regular basis, he did not work again after filing his charges with the National Labor Relations Board in December 1974. Throughout 1975 he did not work a single day. Abdunafi testified that Riggi did not refer him to any job in 1975,[52] though he was present many times in the hall when other individuals were referred out. On July 1, 1975, Abdunafi filed the charge which eventually resulted in issuance of a complaint in the instant case based upon Respondent's alleged failure and refusal to refer him and Adolph Farmer for employment because they filed charges, gave testimony or engaged in intra-union activities in opposition to Respondent-Union's leadership. Though Riggi testified, contrary to Abdunafi, that he had referred Abdunafi to

52. Abdunafi discussed an offer of a job "climbing" with Carrington which he testified occurred in 1975 or 1976. From other testimony this job offer would appear to have been made in 1976.

jobs between December 1974 and July 1, 1975, there was no testimony nor any other evidence adduced wherein any particular job referral to Abdunafi was mentioned until August 1975,[53] at which time, according to Riggi he was told by counsel to keep a record of job referrals offered to Abdunafi which could be used in the event of litigation.

Inasmuch as Abdunafi credibly testified that Riggi did not refer him to any jobs whatsoever after he filed his December 1974 charge with the Board and thereafter filed a new charge on July 1, 1975 based on Riggi's failure and refusal to so refer him, I find on the basis of his testimony and the supporting testimony of General Counsel's other witnesses, as well as the timing of his sudden failure to obtain any work after filing his December charge and the lack of any testimony from Respondent's witnesses concerning any specific job referrals during this period, that the Union failed and refused to refer Abdunafi to jobs from January 1975 through July 1, 1975, as charged, because he filed a charge with the Board.

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53. Corsentino testified concerning an alleged referral of Abdunafi to the Sherling Corporation or the August Arest (or Arace) Diesel job, which he refused and to which member Artis Jackson was sent instead. Corsentino testified that this was in June. Later Corsentino denied that Artis Jackson was referred out instead of Abdunafi. He then stated that he was not present during the alleged referrals. I find Corsentino's testimony too confused to be credited.

Carrington testified that he asked Riggi to send Abdunafi out to work for him at the Diesel job in May. The month of May was supplied to the witness by counsel in his question, not by the witness independently. According to Carrington, when he asked Riggi for Abdunafi, Riggi went out into the hall and called for Abdunafi, but when there was no response, Riggi sent Artis Jackson, a nonmember to the job with Carrington. Riggi testified that the August Arest (Arace) job was offered to Abdunafi in August. If the job was offered at all, I find it would have been in August though Riggi did not note it down at the time.

Decision

Following the filing by Abdunafi of the July 1, 1975 charge, according to Riggi, he began to note down referrals and attempts to refer Abdunafi when he was not at the hall, the purpose being to aid him in his testimony if the charge filed by Abdunafi should ever result in a hearing. Riggi testified that these notes were not, however, all inclusive. Although Riggi testified that the first notation he made concerned a referral which he made to Abdunafi in August 1975, his notes[54] bear no reference to the month of August. The job he recalled offering to Abdunafi in August 1975, according to Riggi, was the August Arest (or Arace) job for Diesel in Union, New Jersey. Riggi did not say anything more about this alleged offer but there are records that Diesel had a job in Union where Arthur Carrington was the steward from January to October 1975. Carrington testified that one morning[55] while at the hall between 6:45 a.m. and 7 a.m. he talked to Riggi about sending Abdunafi to the Diesel job for a few days, that Riggi went out into the hall and called Abdunafi but that there was no response. Neither Riggi nor Carrington testified as to whether or not Abdunafi was present in the hall. Carrington therefore took a nonunion member, Artis Jackson in Abdunafi's stead. Corsentino testified that Artis Jackson, a nonunion member, was referred out to the August Arest job in June 1975 when Abdunafi refused it. At a later point in his testimony Corsentino denied that he was present during the incident. Abdunafi denied that he was referred out to any job in August 1975.

From the totality of testimony of Respondent's witnesses concerning the alleged referral of Abdunafi to the Diesel job in

54. See Respondent's Exhibit No. 25.

55. Carrington placed the incident in May rather than August as had Riggi.

Decision

Union, New Jersey in August 1975, I conclude that the testimony of Respondent's witnesses is unreliable. None of them agreed on the approximate date of referral; they did not agree on the precise name of the contractor or job involved so that they may or may not have been discussing the same job; and there was no agreement as to whether Abdunafi was present in the hall when the alleged job referral was made. In light of the fact that there was little or no agreement among Respondent's witnesses as to this occurrence, and I would credit Abdunafi over any one of them on this matter, I find that the alleged referral was never made. Moreover, if Riggi did offer the job to Abdunafi by calling out his name in the hall, and if Abdunafi was not present at the time that Riggi called out his name, I consider such a referral no referral at all. For, Corsentino admitted that it was unusual for an individual's name to be called out by Riggi when that individual was not present. From the record it is clear that the usual procedure was for Riggi to obtain the job, check the hall to see who was present, then call one of those present and assign him the job. The exception would occur when someone was requested by a contractor by name, and Riggi would call out that person's name to make sure that he was not available for the job for which he had been specifically requested. In the instant case, it is just as likely to assume, granting the animosity of Riggi, Corsentino and Carrington toward Abdunafi, that they called out Abdunafi's name only after ascertaining for certain that he was not there, in order to support Respondent's position beforehand, that they had offered Abdunafi referrals which he refused either personally or by his absence. I find that the practice undertaken by Respondent's hierarchy, after Abdunafi filed his July 1, 1975 charge, of calling out his name to offer him referrals when they knew that he was not present, when this practice was clearly an exception to the general practice in making referrals, was an action undertaken in bad faith, obviously for the purpose of

attempting to manipulate the evidence. I find the same lack of good faith in all incidents that occurred in August 1975, and in the months and years that followed wherein Riggi went out into the hall and offered Abdunafi a job when he was not present and then, in many cases, noted the incident down as a referral. It seems rather basic that an offer made to an absent individual can hardy be accepted and is therefore not an offer at all.

Corsentino referred to an August 18, 1975 job offer when he was not present. To reiterate, this was not an offer, particularly in the absence of any indication that, when Abdunafi did arrive at the hall, he was apprised by Riggi of the alleged referral. Moreover, if this was a different referral than the one previously discussed why did not Riggi testify concerning this matter.

Finally, Corsentino testified concerning a two-man job which was received by phone by Renda on August 1, 1975. A referral slip was made out. According to Corsentino, Renda went out into the hall where there were five men present and asked for two men. Though Abdunafi was one of the five individuals present at the hall, he did not ask for the job. On the other hand, he was not offered the job by Renda. Renda did not testify concerning this incident nor did Abdunafi. However, in light of the siutation at the hall at the time, I do not consider what occurred, to be a referral offer. Abdunafi was not offered the job and since he had received no referrals since the previous December, though present in the hall, while others who had arrived later, were referred out, he certainly had no reason to believe that if he asked for the job he would have gotten it. As it was, two other individuals were referred to the job. Though Corsentino denied that Abdunafi was a "marked man", he admits that there was a special interest in him at the time, and during all of the years during which Abdunafi was struggling with the hierarchy concerning the hiring hall system, Corsentino

admitted that never once did Abdunafi ask Riggi for work. Since the system consisted of Riggi or his assistants referring men to jobs by name, the incident described herein does not appear to me to amount to an offer of a referral to Abdunafi or a refusal of a referral by him. Granted that it would have done his case no harm, had he jumped off the bench and asked Renda for the job, still Abdunafi had not been referred to a job for 10 months and there was no assurance that had he requested the job, he would have been referred.[56] In any event he was not personally offered the job and did not personally refuse it.

Of considerable interest also is the fact that Corsentino testified that the jobs offered on this occasion were taken by Renious Edwards and Robert Farmer. Neither Edwards nor Robert Farmer testified as to this occurrence though both were present at the hearing and were available for questioning. Further, the records supplied by the Union indicate that Robert Farmer did not work at all in 1975. These additional facts cast serious doubt as to the accuracy of Corsentino's description of what actually occurred during this incident.

Riggi testified sketchily that he referred Abdunafi to the McCullum[57] job in 1975. He stated with some hesitancy that the acting foreman on that job was a company foreman named Somerville but could not recall who the steward was. He did not describe the circumstances surrounding the alleged referral. Riggi's notes reflect that on September 23, 1975 at 7:42 a.m. Abdunafi refused to go to work at American Cyanamid for McCullum. The notes also contain the words, "1 or 2 weeks work." Abdunafi emphatically denied being referred out to the

56. Other individuals who specifically requested jobs were denied those jobs.

57. The company's name appears as McConneough in the transcript.

McCullum job at American Cyanamid and insisted that unless it were a Saturday or Sunday, which it was not, he would have been at the hall that day. Under cross-examination, however, Abdunafi's affidavit was quoted as saying, "I can't remember being offered work at American Cyanamid for McCullum Construction Company. I would not have taken that job for one to two weeks because I knew better jobs were coming up and I needed more than one or two weeks work."[58] Abdunafi agreed that he made the statement which appeared in his affidavit. The following testimony was adduced from Abdunafi:

> Q. How did you know how long the job was?
> A. I didn't say there was a job down at McCullum. I said if it was for one or two weeks, that is all I had been getting, I wouldn't take it anyway, because I had been out of work for two or three years.
>
> Q. If you did not know anything about the job, I must ask you or Mr. Abramsas to why you volunteered a comment as to the duration of the job.
> A. I just — It was on the paper, I told you I didn't know anything about a McCullum job.
>
> Q. You offered the statement on the affidavit that you wouldn't take a job for one or two weeks?
> A. I said I wouldn't have taken a job at that particular time because I had also given to Mr.

58. For the record, Riggi denied that referrals made to Abdunafi were scrap jobs of short duration but affirmed that he may have offered Abdunafi some jobs lasting one or two days.

> Abrams . . . a list of jobs that were coming up and there has been a policy of practice of referring the guys out, getting rid of them, so these other jobs can be given to special people.

Although this testimony of Abdunafi does not necessarily prove, in and of itself, that he was offered the McCullum job for he may have learned from the individual taking the affidavit that the McCullum job was for only one or two weeks, and after learning its length volunteered that he would not have taken it even if offered, his statement clearly reflects his attitude toward short jobs and adds weight to Respondent's contention that he did not want to work.

Riggi testified that he could recall offering Abdunafi a job in 1975 with Gordon Construction. The record contains evidence that in 1975 there were at least four Gordon Construction jobs going on in 1975, one of which was still going on in September. According to Riggi's notes, on September 24 at 8:45 a.m., he called for four men to go to work on the Gordon job and although Abdunafi was present at the time, he was not chosen for the job, nor did he ask for it. Three union men and one nonunion man filled the requirements. Abdunafi testified that he was not offered work on the Gordon job. The testimony of Riggi and Abdunafi are not inconsistent. Riggi did not refer Abdunafi to the job by name though from the overall testimony it is clear that most referrals were made by calling out individuals by name, and referring them to specific jobs. It is equally clear that when Riggi came out and announced that there were four jobs available, Abdunafi did nothing to avail himself of the opportunity to work. Thus, it would appear that the personal antipathy between the two individuals which arose because of Abdunafi's protected activities, manifested itself on this occasion in the form of Riggi's refusal, in the face of an outstanding

charge, to refer Abdunafi to the Gordon job by name and by Abdunafi's refusal, because of stubborness or pride, to ask for the job. Again, there is no guarantee that Riggi would have given Abdunafi the job even had he asked for it and so it was not a referral nor a refusal of a job as Respondent contends. Though both are to some degree responsible for Abdunafi not being referred to the Gordon job, the true fault lies with the referral system itself whereby Riggi alone was in complete, sole control of referrals, for since no objective criteria whatsoever were utilized, there was nothing standing in the way of Riggi's making his referral decision on a strictly personal basis, be that decision invideous or otherwise. He chose not to refer Abdunafi.

Riggi testified that in 1975 he called out Abdunafi's name in order to refer him to the Cap-Con job but he thought that Abdunafi was not present at the time. According to Riggi's notes, it was at 8:10 a.m. on September 24, 1975, just 5 minutes before he announced the need for four men at the Gordon Construction job, that he announced the need for six men for 1 days' work at Cap-Con. The notes indicate, however, that Abdunafi was present but did not move. The Union's records support Riggi's notes to the extent that they indicate that there were at least three Cap-Con jobs in 1975, one of which was going on in September. Once again, Abdunafi denies that he was referred to the Cap-Con job on September 24, 1975.

The same analysis lends itself to the Cap-Con incident as to the Gordon Construction incident. In brief, Riggi did not refer Abdunafi; Abdunafi did not volunteer for work and had he done so, there is no guarantee that he would have been awarded the job. Once again, the failure of the Union to use other than purely subjective criteria, together with Riggi's personal dislike of Abdunafi because of his filing of the charge with the National Labor Relations Board and his other protected activities, may

have prevented Abdunafi from getting the job, although there is no way of telling from the record whether other individuals who may or may not have been referred were more deserving of referral. The fault lies with the system.

Riggi testified that in 1975 he offered Abdunafi work on the Post Office job in Elizabeth where Williams Construction was the contractor. Riggi's notes contain an entry dated October 1, 1975, which indicates that Abdunafi turned down this job which was expected to last between 2 and 3 weeks. They also indicate that there was a black shop steward on that job who was a close friend of Abdunafi. The Union records indicate that in 1975 R. Williams was the contractor on one or more jobs and that the black Union members who worked on the Williams job(s) were Renious Edwards, Resbeth Farmer, Ernest Gissendaner, George Neal, Prince Ruth and Robert Farmer. These records show that of the six blacks who worked for Williams Construction in 1975 only Renious Edwards and Resbeth Farmer[59] served as stewards; Edwards for Di Girolamo in January, and Farmer for A & M Gregos[60] in June and July but not in October. The records do not therefore appear to support Riggi's notes. No witnesses were called to testify in support of this alleged offer. Abdunafi specifically and emphatically denied being offered this job. I credit Abdunafi and find that no such referral was made. I further find that the reliability of Riggi's notes is somewhat undermined by the fact that the October 1, 1975 entry refers to the black steward (presumably Resbeth Farmer) on the post

59. Respondent's counsel suggested during examination of Abdunafi that Resbeth Farmer was the steward to which Riggi's notes referred.

60. A & M Gregor was a post office job in Elizabeth and it is likely that R. Williams was another contractor on the same job since in most cases individuals who worked for Williams in 1975 also worked for A & M Gregor the same year.

office job, while records indicate that he was steward on that job only in June and July of that year.

John Corsentino testified that Abdunafi's name was called out in November 1975 to work at Bearley[61] High School in Kenilworth. Abdunafi was not, however, present at the time. Corsentino stated that he could recall the dates because he was personally involved as the steward on the job and was in the hall at the time the referral was made. Corsentino testified further that on this occasion, "No one was aware at the time that I was in the hall or he (Abdunafi) was out of the hall."[62] He stated that Riggi opened the door and called out Adbunafi's name with the intention of sending him to work at the Bearley High School construction site in Kenilworth. Corsentino did not note down anywhere the date of this incident or precisely what occurred but testified that he was present when Riggi wrote it down. Riggi did not testify to anything that occurred in November 1975. Rather, he stated that the Bearly job was in 1976. The Union records indicate that Corsentino was steward on the Truesdale job (presumably the Bearley High School job) in Kenilworth in August through October 1975 and that no one else served in that capacity during the year. Riggi, unlike Corsentino, testified that the alleged Bearley referral occurred in 1976. His notes indicate two entries for November 1975, one dated November 1, 1975 with an accompanying time notation — 7:40. The note states simply "Wakil didn't show up yet!!". The other entry, dated November 18, 1975 states, "Call Wakil at 7:31 a.m. to go to work at Johnny Corsentino's job. Not here yet!!". Other Union records indicate that Corsentino did not work anywhere else in

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61. Also referred to in the record as Bearsley or Brearley.

62. The statement, volunteered by Corsentino while on the stand, appears to have been made to explain the lack of witnesses.

1975. Abdunafi categorically denied being offered any job in November 1975. With respect to the fact that Riggi called out Abdunafi's name on two occasion in November 1975, I find that since Abdunafi was not present at the time, he was not referred out. It also seems obvious that if Corsentino or Riggi were interested in having Abdunafi on that particular job, it would have been easy enough to contact him beforehand to let him know of the opening, or offer it to him later that day when he arrived at the hall. The matter, as far as the record reflects, was never discussed with him afterwards. If Riggi was anxious to refer Abdunafi, to avoid issuance of complaint on the charge which was already on file, he could easily have made arrangements with him, as he did with other individuals, to have him report for a particular job referral. He chose not to do so but rather to call out Abdunafi's name, knowing full well that he was not present, then to jot down the incident in order to build a case against Abdunafi in preparation for the hearing. I can reach no other conclusion as to the purpose of this charade in which Respondent's officers participated.

Riggi testified that Abdunafi refused a referral to a job working for Plainfield Plumbing. His notes reflect that on December 1, 1975, at 8:15 a.m. Abdunafi refused to go to work for Plainfield Plumbing at the Thomas Jefferson School on a job which had just started and which was supposed to be a long job. John Corsentino supported Riggi by testifying that Abdunafi's name was called out for the Plainfield Plumbing job, the new Elizabeth High School. The Union records which reflect where stewards worked in 1975 do not mention Plainfield Plumbing nor any job in Elizabeth or elsewhere going on during December 1975. However, other documents indicate that one member of the Union did work at one time or another in 1975 for Plainfield Plumbing for 48 hours. To this small extent, the records support the testimony of Riggi and Corsentino.

Abdunafi however, when asked on cross-examination if he had not been offered a job on December 1, 1975 "at the new Thomas Jefferson High School job where the contractor was Plainfield Plumbing," pointedly and forcefully stated, "There has never been a new Thomas Jefferson High School job." When asked, "Was there any Thomas Jefferson High School job," he replied "Not at the time. There is now." Counsel at this point abandoned the line of questioning concerning this job and did not thereafter challenge Abdunafi's assertion that there was no such job at the time. Robert Farmer was called to testify concerning this alleged referral. He testified, in support of Riggi and Corsentino that he had heard Abdunafi reject one job offered to him, a high school job in Elizabeth, and that Riggi gave Abdunafi a referral slip for the job. After stating that he heard Abdunafi reject the referral, he testified that he did not know if Abdunafi accepted the job or not. The inconsistency is patent. Later Robert Farmer testified that he did not actually hear Riggi offer Abdunafi the high school job, but that he only heard Abdunafi called into Riggi's office and did not hear what occurred therein. As to the "referral slip", Robert Farmer testified further that he saw Riggi give Abdunafi a slip of white paper the size of a referral slip but could not see the writing on the paper and merely presumed that it was a referral slip although admittedly it could have been merely a message of some kind. Still later, Robert Farmer testified that he had heard from a third party that Abdunafi had been offered the high school job but had turned it down. I found Robert Farmer's testimony with regard to this matter, inconsistent and not worthy of credit. I credit Abdunafi. If Abdunafi rejected the referral as Riggi and Corsentino testified, he would not have been given the referral slip as Robert Farmer testified.

Riggi testified that he referred Abdunafi to a job with Anastasia Brothers in December 1975 or January 1976 at the

new Elizabeth High School which eventually lasted 7 months. The entry in Riggi's notes of January 7, 1976 — 7:25 a.m. states, "call for Wakil to go to the school (new) job — long job — not *here* (Anastasia Bros.) — (send Artis Jackson). Corsentino testified in support of Riggi to the effect that Abdunafi's name was called out for referral on this job. Abdunafi testified that he thought he probably was in the hall on January 7 but denied knowing anything about a referral to any Anastasia Bros. job. From the testimony of all witnesses I conclude that Abdunafi's name was in fact, called out at the hall before he arrived but for reasons stated earlier, I do not consider this act to be a referral.

Resbeth "Nick" Farmer testified that in January 1976 he was working at the Post Office job. On this occasion he went to Riggi and told him that he needed two men to work nights to take care of the fire at a concrete pouring and asked him if he could have Adolph Farmer and Abdunafi. Riggi replied, "certainly." The job was to last 2 nights and, according to Nick Farmer, Riggi was aware of this fact. Abdunafi and Adolph Farmer did get the job through Nick Farmer's efforts, according to Abdunafi. Riggi's notes on the subject contained the following entry;

> January 1976 — Wakil worked at the Post Office job in the heat — Nick Farmer

From 1975 through 1977 these few hours were all that Abdunafi worked.

The incident would appear to support the theory that Riggi did not so much object to Abdunafi's working as much as he did making the referral himself, directly to Abdunafi, for making a direct referral required his having to address Abdunafi and the record is replete with evidence that the two men disliked each

other by this time. Nevertheless, since most of the referrals were made at the hall by Riggi directly addressing individuals and referring them verbally to jobs, his refusal to do so with regard to Abdunafi because of personal dislike for the man is, in fact, a refusal to refer for invideous, extraneous reasons and is violative of the Act. His willingness to permit Abdunafi to obtain work through other sources, namely through Nick Farmer, with his indirect tacit approval is no substitute and does not relieve him of his duty to refer Abdunafi to jobs as he had other applicants for employment.

Arthur Carrington testified that he spoke to Riggi by phone from Linden about sending Abdunafi out to work with him on the Penn-Jersey job at the Public Service in Linden where he was the foreman. He explained to Riggi that the job would be a short term job.[63] Riggi replied that he doubted that Abdunafi would come out but he would ask him. He asked Carrington to hold the phone for a minute. Shortly thereafter, according to Carrington, Riggi got back on the phone and explained to Carrington that Abdunafi would not work with him.[64] Riggi testified with the help of his notes,[65] that he received a phone call from Carrington on March 1, 1976 during which Carrington asked to have Abdunafi sent out to the Penn-Jersey job. Riggi then went out to Abdunafi who was in the hall and said, "Here is a referral slip to go to the job where Artie Carrington and Leo Charles are working." According to Riggi, Abdunafi replied that

63. The job lasted about 3 or 4 months, February to May.

64. Carrington identified this particular incident as March 1977 when clearly he meant to say March 1976 since all other testimony on this subject matter concerned the latter date.

65. Initially, before referring to his notes, Riggi testified that the incident occurred on March 1, 1975.

he did not want to go on the job. Riggi's notes support this testimony and that of Carrington, They state:

> March 1, 1976 7:30 — Wakil refused to go to work (Penn-Jersey) with Art, Leo — in Public Service (probably overtime later — (??)

Corsentino also testified that Abdunafi was referred to the Penn-Jersey job in Linden where Carrington was the foreman and Leo Charles the steward but did not describe the referral with any particularity.

Abdunafi denied that he was referred to the Penn-Jersey Public Service job but in another part of his testimony admitted that Riggi approached him on one occasion and said to him while out in the hall, "I have a job climbing with Arthur Carrington. Are you afraid of heights? Do you want it?". Abdunafi replied that he was afraid of heights and declined the job. He noted that he had been in the hall when the job had first started and that by the time Riggi offered him the job, it was fully manned so that he would have been the first one laid off. He asked Riggi why he did not refer him when the job first opened. In any event, Abdunafi insisted that the job required climbing and that was the reason he turned it down. I conclude that the job climbing concerning which Abdunafi testified and the Penn-Jersey Public Service job were one and the same. I also conclude that though there was an offer of a job, it was a climbing job which Abdunafi turned down for that reason. There is no way to know for certain, from the record, whether Riggi knew that Abdunafi was afraid of heights and felt safe in offering the referral for that reason. Riggi had known Abdunafi for many years and could possibly have known that such a referral would be rejected. At any rate, the offer of the job was, in fact, made and rejected.

Decision

Riggi testified that later in March he made a second referral to Abdunafi at the same Anastasia job to which he allegedly tried to refer him previously when Abdunafi was not present. According to Riggi's notes he called out Abdunafi's name on April 1, 1976, at 7:45 a.m. to go to work for Anastasia but again he was not present. Carrington testified that he was the steward on the Anastasia job and specifically asked Riggi to send Abdunafi out to the job. He further testified that from the information he got, Abdunafi turned down the job. He admitted that he did not, however, know this for a fact. When asked when he spoke to Riggi about sending Abdunafi to the Anastasia job, he testified that it was in June or July 1976. Corsentino testified also that Abdunafi's name was called out in April to be referred to the Anastasia job but he was not present in the hall. Abdunafi testified that he believes he was present on April 1, 1976[66] but denied rejecting any referral to the Anastasia job on that date. I find Abdunafi was not present when his name was called out in connection with the alleged Anastasia referral and for reasons already enunciated, I do not consider the fact of his name being called out in his absence tantamount to a referral. Similarly, Riggi's notes reflect that he called out Abdunafi's name on April 9 and 21, 1976 when Abdunafi was not present. Both were presumably for the Anastasia job and since he was not present cannot be considered legitimate referrals.

Carrington testified that he was foreman on the Torcon job and asked the shop steward, John Corsentino about referring Abdunafi to that job. This discussion, according to Carrington, occurred in March 1977. The job was already in progress when Carrington started in December 1976 and was still going on as of the time of the hearing. After Carrington asked Corsentino to

66. Abdunafi had notes concerning his probable presence or absence from the hall on certain days.

have Riggi refer Abdunafi, he was not present when Corsentino spoke to Riggi about the matter and admitted that Riggi may or may not have made the referral. Corsentino testified that it was on March 15, 1976 that Carrington and Corsentino had the conversation concerning the referral of five men to the Torcon job during which Carrington allegedly suggested that Corsentino see to it that Abdunafi was referred. According to Corsentino, he brought the matter of Carrington's request for five additional laborers to Riggi's attention and Riggi called out Abdunafi's name that morning. Abdunafi was however, not present and five other men were sent out that day. Riggi testified that Carrington was the foreman on the Roselle Sewage Disposal job in Linden, New Jersey where Torcon was the contractor and that Carrington recommended that Riggi send Abdunafi out to the job. According to Riggi, Corsentino spoke to him about Carrington's request for Abdunafi. He called Abdunafi over and said to him, "I have a call for a man to be referred to the Torcon job," but Abdunafi refused the job. Abdunafi denied being referred to the Torcon job. From the testimony, it should be noted that Carrington and Riggi are in agreement that the incident occurred in 1977 whereas Corsentino cites March 15, 1976 as the date. More importantly, Corsentino testified that Abdunafi was not present in the hall when the referral was made, while Riggi described a conversation during which Abdunafi was present, was offered the job and refused it. The obvious discrepancies which exist in the testimony of Respondent's witnesses with respect to the alleged Torcon referral will not permit me to credit them. I credit Abdunafi and find that no such referral was made, at least not in his presence. If, in fact, Abdunafi's name was called out in his absence, for reasons stated earlier, I find this not to be a referral.

Riggi testified that in mid-1976 he stopped keeping a written record of his attempts to refer Abdunafi to work because

he was advised by counsel that the Regional Office of the NLRB had advised him that it intended to dismiss[67] the charges. Nevertheless, according to Riggi, he continued to refer Abdunafi out to jobs both when he was present at the hall and when he was absent. In January, 1977 a complaint issued against the Union in the instant case. The Union had been advised about a month before actual issuance that the complaint would issue.

In September 1976[68] Riggi called Abdunafi and said, "I have a job here with Hicks. How long is the job, Hicks?" Hicks replied, "Until it is over." Riggi then said to Abdunafi, "Do you want the job?" Abdunafi replied, "May I speak to you for a minute?" Riggi then said, "Don't give me none of that! Just answer me, 'yes' or 'no'!" Abdunafi did not give him the required 'yes' or 'no,' so Riggi walked away and Abdunafi did likewise. Abdunafi testified that Riggi did not have a referral slip in his hand during this conversation as he usually did. He also testified that had Riggi permitted him to explain, he would have told him

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67. General Counsel asserts that Abdunafi's charge never was dismissed in its entirety but only in part and then much later than the date that Riggi stopped taking notes on referrals. The record contains a letter from the Regional Director dismissing in part, certain allegations contained in the charge filed in the instant case. That letter is dated September 7, 1977, well over a year after Riggi's final entry. Whatever Riggi's reason for stopping his note taking, the reasons proffered by him are not supported by the record.

68. Riggi testified concerning a referral he offered to Abdunafi at the Hicks' job at Evenbow in 1977. I conclude that Riggi was in error as to the year the incident occurred and that the referral which he discussed as having occurred in 1977, was in fact, the incident described more fully by Abdunafi as having occurred in September 1976. That the earlier date is more probable is supported by Respondent Exhibit No. 16, a letter dated October 1, 1976 in which Abdunafi described the incident in detail. That the two incidents are the same is supported by the description of the job and the presence of the same group of people during the referral as testified to by both Riggi and Abdunafi.

that he had an appointment at the Veteran's Administration Hospital that morning but would be available for work that afternoon. Nevertheless, despite the manner in which it was made, I consider the discussion to amount to an offer of referral which did not eventuate in Abdunafi's obtaining employment because of the antipathy existing between them which, in turn, was due to Abdunafi's previous attempts to unseat Riggi as the power in control of the referral system and due also to his having filed charges with the National Labor Relations Board. But, even had Abdunafi not been engaged in these protected activities the mere fact that Riggi could and did, in fact, exercise his unique authority to deny a member employment simply because of a dislike for that person amply demonstrates the evil of a referral system which operates without any objective basis for determining what referrals are equitably to be made. The officious manner in which the referral was made effectively prevented its acceptance by Abdunafi. Riggi, in complete control of the situation made it quite clear that by offering Abdunafi the Hicks job, he was doing him a favor and would brook no foolishness from him. Abdunafi, a proud man, felt degraded by the experience and rather than explain his problem let the opportunity for referral pass.[69] Nevertheless, despite some sympathy for Abdunafi's position, I find that there was, in fact, a referral, though tainted with animosity, which Abdunafi rejected.

Riggi testified that in 1977 he could recall referring Abdunafi to two specific jobs although there were others. But Riggi could not recall when it was in 1977 that he called out Abdunafi's name nor could he remember the names of the jobs

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69. Abdunafi stated as much in a letter to the Advice section a few days later. In this letter Abdunafi also intimates that he would not in any event have accepted the referral because of an ear problem.

to which he intended to refer Abdunafi. Abdunafi denied receiving any referrals at all in 1977. In August or September 1977 Abdunafi was engaged in conversation with Leo Charles during which Abdunafi stated that he was not working because Riggi would not send him out. Charles later discussed the matter with Riggi in his office while Abdunafi was out in the hall. He said to Riggi "John, Wakil said you won't send him to work." Riggi replied, "No, I will send him to work any time. I tried to send him to work. He wouldn't go. If he shaped up in the morning, I would send him out." Charles then went to Abdunafi and reported what Riggi had told him. Abdunafi again denied that Riggi had offered him work whereupon Charles challenged Abdunafi to make that statement to Riggi's face. Abdunafi agreed, and both he and Charles went into the office. Once there, Charles said to Abdunafi, "I understand that Johnny has offered you a job." Abdunafi replied in Riggi's presence, "He's a God damned liar. Tell him to name me one job that he tried to give me." Riggi then stated, "I tried to send you to work. You don't get up here until it is too late to send men out." Abdunafi insisted, "Name me one job." Riggi did not name a job but turned red and walked away.[70] The importance of the incident lies in the fact that as late as August or September 1977, Riggi when challenged to name a single referral which he had given to Abdunafi was unable to do so despite his claim that he had written many of them down long before on his calendar and on scraps of paper. I believe he referred Abdunafi to no jobs other than those which Abdunafi mentioned. This conclusion is supported by the testimony of Nick Farmer who stated that he has asked Riggi why Abdunafi was not working and although Riggi told him many times over the past few years that Abdunafi does not want to work, that he has offered Abdunafi jobs which

70. The incident is based upon the combined testimony of Abdunafi and Charles.

he rejected and that Abdunafi never gets to the hall early in the morning in order to be referred, he, Farmer never once during these years ever heard Riggi offer Abdunafi a job.

Still another incident related by Nick Farmer sheds light on the Rigg-Abdunafi relationship, on the failure of Riggi to refer Abdunafi and on the reasons for his failure to do so. Thus, 3 or 4 months after Riggi granted Nick Farmer's request to use Abdunafi and Adolph for 2 nights work in January 1976, Nick advised Riggi that a foreman's job was opening up and brought up Abdunafi as a possible candidate. Riggi replied that he would not let Abdunafi be the foreman because "it would not look good," but that Nick could take Adolph if a foreman were needed. As it turned out, the position never opened up. I find the incident reflective of Riggi's attitude toward his role as the sole source of referrals. He was willing to refer applicants to jobs, to appoint stewards and to agree to the appointment of foreman, but would not agree to personally refer or appoint individuals of whom he did not personally approved.

4. Alleged Refusal to Refer Adolph Farmer

a. *Adolph Farmer's Protected Activity*

Adolph Farmer testified that he has been speaking out against the policies of the Union leadership since 1971 and has continued to do so right up to the time of the hearing. Throughout this period he supported Abdunafi's position and next to Abdunafi, was the most vocal of any of the members critical of the Union hierarchy. Riggi admitted that Adolph Farmer has spoken out against union policies but asserted that he had been doing so for 20 years. He admitted that Adolph Farmer was a very vocal opponent of his and the Executive Board's policies and had been such for many years and that he,

Riggi, was aware of this fact. From 1969 on, according to Riggi, Adolph Farmer and Abdunafi were consistently more vocal in this respect than anyone else. John Corsentino also stated that Adolph Farmer exercised his right to speak out at meetings, at times vociferously disagreeing with the policies of the Union.

Among the Union policies which Adolph Farmer attacked was its referral system, though he desired to correct abuses by working within the local and was not in favor of maintaining a roster. Other targets of Adolph Farmer were the way trial panels were picked as well as their decisions; the choice of alternates to the Union convention and the means whereby they were chosen; the fact that there were no black representatives to the convention chosen by the local; and the awarding of good jobs to pensioners, including Riggi's father. Since these policies were also the target of Abdunafi during this period, it was clear that he and Abdunafi were allies in their attacks on the Union leadership and its policies.

In 1971 Adolph Farmer brought internal charges against Riggi, as did Abdunafi alleging unfair hiring practices and showing preferential treatment to certain members of the Union. Like Abdunafi, he too wrote letters to the International complaining about the Union and Riggi in particular, and when his charge against Riggi was dismissed, he appealed that decision. Adolph Farmer testified that he filed two charges, one against Riggi and one against the Executive Board. Though other members filed internal charges against the Union, no one except Adolph Farmer and Abdunafi filed charges against Riggi personally. In addition to filing his own charges he supported the numerous charges filed by Abdunafi both against the Union Executive Board and against Riggi. In a letter from the Executive Board signed by Executive Secretary, Philip Renna, dated January 14, 1972 and addressed to Abdunafi, Abdunafi

was advised that his charge alleging the falsifying of minutes filed November 3, 1971 would not be heard because Adolph Farmer had already filed charges based on similar allegations and he had been denied a hearing for lack of evidence. Thus, knowledge of Adolph Farmer's alliance with Abdunafi in common cause against the Union leadership was admittedly recognized. Moreover, these charges filed by Abdunafi and Adolph Farmer were the topic of discussion at Union meetings and so they were well publicized.

After Adolph Farmer brought charges against Riggi, charges were, in turn brought against him. Like Abdunafi he was charged with vulgarity or profanity while presenting his views at the meeting despite the fact that four letter words were used at the hall by others and charges were not brought against anyone on that basis before nor since. Subsequently he was found guilty and suspended just as was Abdunafi. Respondent denies that Adolph Farmer was suspended because he brought charges against Riggi and was otherwise actively pursuing a course of action contrary to the policies of Riggi and the Union hierarchy. I am convinced otherwise, however, for on June 24, 1972, Renious Edwards filed an internal charge against the Executive Board in connection with the issue concerning the appointment of delegates to the International Convention and soon after his charges were found to be without merit, he too was counter-charged by the Executive Board with slander and with conspiring with Adolph Farmer to file duplicate false and malicious charges. He was thereafter found guilty as charged and like Abdunafi and Adolph Farmer suspended from attending meetings.[71] Although the action taken against Adolph

71. Edwards' suspension was for 1 month.

Farmer was not violative of the Act,[72] it clearly manifested, when viewed with that taken against Abdunafi and Edwards, an animosity founded upon the Union's dissatisfaction with the internal protected concerted activity of those participating in it.

In 1974, during another meeting, according to Adolph Farmer, Abdunafi was trying to get the chairman's attention without apparent success. Adolph interceded and stated that Abdunafi was a member and had a right to speak. The chairman replied that Abdunafi had been talking and talking and that he did not want to hear him anymore. Farmer replied, "Bullshit." Farmer testified that this remark was magnified into "a whole lot of swear words." Riggi brought charges again and Adolph Farmer was again suspended for another year.

For the next 2 or 3 years while Abdunafi carried on his letter writing campaign, appealing to the International concerning the inequities practiced by the Local Union, Adolph Farmer continued to conduct his campaign on the local level to achieve the same results that Abdunafi was attempting to gain. Adolph Farmer's name appeared in several of Abdunafi's letters to the International.

In December 1974 Abdunafi filed his first charge[73] with the National Labor Relations Board against Respondent alleging that the Union caused one employer to terminate him because of his intra-union activities and that the Union operated its hiring hall in a manner which discriminated against applicants who

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72. *International Alliance of Theatrical Stage Employees RKO General, Inc., WOR-TV Division*, 223 NLRB 959 (1976) citing *Scofield v. N.L.R.B.*, 394 U.S. 423, 429 (1969) and *N.L.R.B. v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967).

73. 22-CB-2851

were not friendly with its business agent. An investigation followed but on February 21, 1975 his charge was dismissed as was his later appeal. Adolph Farmer cooperated in the investigation following the filing of the December 1974 charge. He testified that he participated in the Board's investigation in 1975 and gave a statement[74] to the Labor Board's agent containing information in support of Abdunafi's charge. Adolph Farmer's testimony is fully credited.

Following dismissal of Abdunafi's first charge, Abdunafi and Adolph Farmer, on July 1, 1975 went to the Regional Office of the National Labor Relations Board where Abdunafi filed the charge in the instant proceeding. Though the charge was signed by Abdunafi and the body of the charge refers to "Abdunafi and other employees" and does not make any reference to Adolph Farmer by name, clearly the charge was filed on his behalf as well as Abdunafi's and he participated thereafter in the investigation of the charge, furnishing information in support thereof. At meetings in 1975 the NLRB charges were read[75] and thereafter discussed on the floor by Abdunafi and Adolph Farmer as well as the Union leadership who advised the members that Abdunafi and Adolph Farmer had filed the charges with the Labor Board. At a meeting some time later in 1976 or 1977, Riggi talked about lawyers' fees necessitated by

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74. The affidavit, though not offered into evidence at the hearing, was identified by Respondent's counsel and utilized for purposes of cross-examination during the hearing.

75. The dates of the meetings are not identified, but clearly if the charges were read to the membership to inform them of the fact that they were filed, they would have been read shortly after their receipt by the Union, not several years later as Respondent urges in its brief. Moreover, if Respondent desired to show in the face of indications to the contrary, that no discussion concerning the charges occurred in early 1975, it could have produced minutes of the meetings and witnesses to so testify. This it did not do.

the filing of the charges and stated that assessments might have to be levied or dues raised because of the charges brought by Abdunafi and *Adolph Farmer.*

The above described facts clearly indicate that Adolph Farmer was extremely outspoken in his views and actively pursued an overt campaign against the policies of the Union leadership which culminated in his filing charges against both the Executive Board of the Union and John Riggi personally in 1971; that these protected activities were undertaken in concert with Abdunafi, a fact well known to the Union; and that the Union leadership retaliated against Adolph Farmer and Abdunafi by filing counter-charges against them on obviously pretextual grounds thus showing animus against them based on their having engaged in these protected concerted activities.

The above facts similarly reveal that Abdunafi filed charges against the Union in December 1974 and that Adolph Farmer cooperated in the investigation of that charge; that Abdunafi and Adolph Farmer together visited the National Labor Relations Board on July 1, 1975, where Abdunafi filed another charge; and that, Respondent's position to the contrary notwithstanding, the Union knew of, and openly discussed these charges at various meetings referring to them as having been filed by both Abdunafi and Adolph Farmer. Respondent's knowledge of Adolph Farmer's role in the filing of the charges and in the investigation is amply demonstrated by the evidence. But even if his participation in these protected activities were not based on definite knowledge, I find that Respondent presumed his complicity in the filing of the charges. I do so on the basis of the fact that these Labor Board charges contained allegations which both Abdunafi and Adolph Farmer had been leveling at the Union since 1971 in numerous internal charges, in correspondence and in verbal assaults at meetings. Since the

Union was well aware of the Abdunafi-Adolph Farmer joint campaign to undermine the referral system as operated by Riggi and the union hierarchy, it is safe to assume that even without definite proof of Adolph Farmer's complicity, Respondent would assume that they were working together to achieve through the auspices of the National Labor Relations Board, the goal which they had been trying unsuccessfully to achieve for the previous several years through the utilization of internal processes.

b. *The Failure of the Union to Refer Adolph Farmer*

From 1952 through 1970 Adolph Farmer, according to the Union records, averaged close to 1600 hours of work per year. In 1971 he worked 91 hours. From 1972 through 1974 he averaged a little over 800 hours and in 1975 he worked not at all. In 1976 and 1977 he worked 838-½ and 1,056 hours respectively.

According to Adolph Farmer, from 1960 through 1970 he worked mostly as a foreman or steward. During this period, again according to records supplied by the Union, he averaged 1,768 hours per year. The fact that as steward he was frequently the last man to leave a job accounts, in part, for the large number of hours worked by him during this period of time. Even when he was not steward, during the period 1960 through 1970 he worked regularly up until the time he filed the charge against Riggi. During that period he frequently worked for a year or more without being laid off for a day, sometimes albeit with broken service with work at another location.

Adolph Farmer testified that a certain group of laborers in the local, numbering perhaps 100, work 1500 to 2500 hours every year and that he was one of these people during the 1960-1970 period. The rest work sparingly. For this reason he does

not feel that working 500 to 1500 hours is a lot.[76] Despite apparently preferring the long jobs Adolph Farmer, when out of work, accepted any job whether it was 1, 2 or 5 days, even during the 1960-1970 years and the record bears out his testimony.

John Riggi testified with regard to Adolph Farmer's work during the period 1960-1970 that he was awarded preferential treatment, more work and appointments as foreman. Riggi admitted that he was responsibel for Adolph Farmer obtaining more and longer jobs but stated that the foreman jobs were "out of his realm." The record, however, indicates in various places, that in many instances the Union could and did appoint foremen. In any case, Riggi admitted that it was possible that Adolph Farmer was foreman from 1965 to 1970 more often than not but that from 1971 until 1976, he no longer served as foreman. Riggi could not recall whether Adolph served as steward from 1971 until 1976 and I therefore find in accordance with Adolph Farmer's testimony that he did not. Riggi agreed, upon being cross-examined, that from 1965 through 1969 Adolph Farmer served as steward or foreman, but after filing his first charge against Riggi in 1971 he was no longer a steward or foreman but only a laborer, and that is what the Union's own records show.

When Riggi was questioned as to why Adolph Farmer worked on so many long jobs as foreman or steward prior to his filing the charge against Riggi but thereafter was no longer serving as a steward or foreman and worked only 91 hours in the enitre year of 1971, he gave several explanations. In the 70's, according to Riggi, he received complaints from between 8 and 11 other members that Adolph Farmer and certain other

76. 500 hours is only about 3 months work.

members were receiving too much preferential treatment and that they wanted their share too. Riggi testified that when faced with these requests, he asked the complainants how many pieces they thought were in the pie, but then decided to try to "balance it out," and to try to spread the work around "to keep an even keel in the local." A second reason for Adolph Farmer's sudden drop in working hours after his filing charges against Riggi, according to Riggi, was that in the 1970's work was not plentiful and so to take care of Adolph Farmer he told his (Adolph's) brother, Nick, that he had *carte blanche* to take Adolph on the job and give him almost as many hours as he got himself. He added that in light of his understanding with Nick, he doubted that Adolph was really willing to work. Upon being examined further, however, Riggi admitted that the individuals who, along with Adolph Farmer, had received preferential treatment, long hours, more jobs and appointments as stewards and foreman during the 1960's, continued to do so in the 1970's, year after year, working 1800-2000 hours. No reason was given why Carmen Urso, Paul Fareno, Nick Signorelli, Joe La Sola, Joe Marino, Arthur Carrington and Willie Edwards continued to receive preferential treatment in the face of the demands of the complainants while Adolph Farmer did not; nor did Riggi name any of the alleged complainants; nor did Respondent present any witnesses concerning this request for a more equitable distribution of work. As far as Riggi's explanation that work was no longer as plentiful in 1971 as it was in 1970, that explanation does not hold up, for the Union's own statistics indicate that the yearly hours per man dipped only slightly from 1970 to 1971 and Riggi admitted that the other members receiving preferential treatment did not suffer because of this minor drop in available hours. Finally, Riggi's statement that Nick Farmer was given *carte blanche* to bring Adolph Farmer onto any job whenever he wanted is meaningless in the face of testimony that Nick frequently did not have the opportunity to

make the offer. Moreover, if prior to his filing charges against Riggi, Adolph Farmer had sufficient work and was frequently appointed steward or foreman, the sudden drop in his working hours and his failure to obtain stewardships and positions as foreman from Riggi is in no way explained away by Riggi's statement that he could get work from his brother. Clearly, Adolph Farmer did not get work from his brother after filing the charge against Riggi. He did not get much work from anybody but dropped from 1,292 hours in 1970 to 91 hours in 1971. Since prior to his filing of charges against Riggi in 1971 Adolph Farmer accepted each and every job even for a day or two, and credibly testified that he never turned down jobs because they were short, regardless of the source, there appears no basis to credit Riggi's proposition to the effect that Adolph Farmer did not want to work.

After Adolph Farmer filed his charge against Riggi in 1971 he continued to shape up at the hall, arriving between 7 a.m. and 8 a.m. and staying until it closed. Numerous witnesses testified to the regularity with which he shaped up, some testifying that he shaped up more than anyone else. Despite the regularity with which Adolph Farmer shaped up in 1971, ready and willing to go to work, Riggi did not call his name for referral. Nor did Corsentino nor Renda refer him to any jobs after Riggi left the hall for the day. Regardless of what time he arrived, others would be sent out while Adolph Farmer was left sitting in the hall. Just as was the case with Abdunafi, applicants for referral who arrived after Adolph Farmer were nevertheless sent out while he remained behind.

The Union's employment records indicate that Adolph Farmer worked almost not at all in 1971 but did work on certain jobs thereafter though not nearly as often as he had prior to his filing charges against Riggi and the Executive Board of the

Local in that year. Though he served as steward or foreman rather consistently prior to 1971, he received no such appointments after filing the charges in 1971 for the next 5 years. In fact, he testified, he received no job referrals directly from Riggi from 1971 through 1974 and only one job[77] thereafter. Adolph Farmer's brother, Nick, testified that he knew of no jobs on which Adolph worked which were not obtained through Nick. Riggi conceded that he made only two attempts[78] to refer Adolph Farmer to jobs in the years 1971 through 1977 and that all the work he actually obtained was through the intercession of his brother Nick. Riggi's failure to refer Adolph Farmer quite clearly was not because he was oblivious of his needs because Adolph Farmer shaped up regularly and was easily visible to Riggi if he chose to offer him work and moreover, Nick personally requested Riggi, on a number of occasions to send Adolph to jobs.

Adolph Farmer obtained just three jobs in 1972 for a total of 853 hours. He was not referred to any of these jobs by Riggi but rather obtained them from his brother who admittedly had to clear them through Riggi. On these occasions, Nick would come to Adolph and tell him to come on the job with him, that it was all right because he had checked it out with Riggi who had given his permission. In 1973 Adolph Farmer worked a total of 806 hours, all but 88 of which were on the Damon Douglas job. Nick Farmer was the foreman on the job and Arthur Carrington may have been the steward since Adolph Farmer, according to Carrington, asked him to put him on that job. Carrington got Riggi's permission and Adolph Farmer got the job.[79]

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77. The Battin High School job, discussed *infra*.

78. Specific incidents are discussed *infra*.

79. Adolph Farmer testified that he got one job through Carrington in the 1970's — the Sealand job. This is probably the same job.

Decision

In 1974 Adolph Farmer worked on three jobs[80] within the jurisdiction of the Union for a total of 771 hours. None of these jobs were offered to him by Riggi. Rather, he obtained these jobs through his brother, Nick. Thus, to summarize, from 1971 through 1974 Adolph Farmer obtained no direct referrals to any jobs from Riggi despite the fact that he shaped up consistently at the hall and despite the fact that prior to his campaign against Riggi beginning in 1971, he received a large number of referrals, even preferential treatment from Riggi. Once he undertook to challenge the Union's leadership by filing charges within the Union, he no longer received referrals at the Union hall but had to depend upon his brother[81] to initiate action to obtain work for him. From the entire picture presented, it appears clear that while in the good graces of Riggi and the Union leadership Adolph Farmer obtained most of his employment through direct referrals from Riggi, but once he made an enemy of Riggi, the sole person in control of the referral system, by filing charges against him within the Union, Riggi determined to do him no favors and did not, thereafter, refer him to jobs as he did previously, and Adolph Farmer then had to rely upon Nick Farmer to intercede in his behalf to obtain employment. Thus, it would appear that, whereas Adolph Farmer obtained employment through direct referral before he participated in protected concerted activities within the Union, after he engaged in said activity, he no longer was the recipient of such referrals, and if he was denied this service because of his protected concerted activities it would have been violative of the Act, but for the Section 10(b) limitations. And it would not matter in the least that the sole reason that he was denied the benefits of the

80. Actually, Adolph Farmer worked on one job, worked on another job, then returned to the first job.

81. In the one case noted, Carrington befriended him and obtained work for him.

referral system was because Riggi felt that he no longer had to "do favors" for the man whom he had befriended and who had, despite his friendship attacked him. If a referral system is operated without objective criteria as its basis, it must, of necessity, be subject to the human frailties of its controller, and the instant case proves the point. For assuming that Riggi desired to be as fair and impartial as he could possibly be, he was unable to point to either Abdunafi or Adolph Farmer and award them worthwhile jobs after being attacked by them as he had been by their challenging him and his control of the system verbally at meetings, and filing internal charges against him. Thus, it follows that a referral system totally under the control of a single individual or group of individuals subject only to personal preferences of a subjective nature, without guidelines or objective criteria to safeguard the rights of individuals is *per se* violative of the Act. For each potential applicant for referral must be guaranteed sufficient information as to his position *vis a vis* referral to enable him to question, to accept or reject what he is told concerning that position, and without the utilization of such criteria, individuals like Wakil Abdunafi and Adolph Farmer, are blindly at the mercy of the person or persons in control of the system.

In December, 1974, Abdunafi filed his charge with the National Labor Relations Board and, with the aid of Adolph Farmer, undertook to pursue his goal of referral system reform through the Federal government rather than through internal means. Thereafter, according to Adolph Farmer, he received absolutely no work at all, not from Riggi, Corsentino or Renda, nor, according to Union records, from anyone else. Nick Farmer, almost the sole originating source of jobs for Adolph Farmer, from 1971 through 1974 had no opportunity in 1975 to request that Adolph be sent out to his job to work with him. All 12 or 13 laborers sent to the A.M. Gregos Post Office job by the

Union were referred out of the hall, and were not requested by Nick Farmer because Nick was not advised by Gregos that there were openings. The job lasted throughout 1975 and into 1976.

Though Adolph Farmer continued as before to shape up regularly in 1975, ready, willing and able to report for work, he was not referred to any jobs, while other applicants for referral who had arrived at the hall later than Adolph Farmer, received referral slips and went to work. Riggi admits that he saw Adolph Farmer shaping up regularly in 1975, and sitting in the Union hall but asserts that he could have been working. Riggi testified that he did not, however, ask Adolph Farmer if he wanted to go to work, and admitted noting that he was still sitting there when he left each morning. Throughout 1975 and the first part of 1976 Adolph Farmer watched more than 50 people repeatedly reporting to the hall and going off to work after referral while he just sat there, not moving once. He would customarily stay at the hall until it closed at 9:30 a.m. No one, Adolph Farmer credibly testified, shaped up as often as he and Abdunafi did, without being referred out.

Nick Farmer testified that he had been told by Riggi that "Adolph could go to work anytime he wanted, all he had to do was come in and see him, he had no hard feelings against Adolph, he could come in anytime he wanted." According to Nick Farmer, applicants for referral either go into see Riggi or Riggi comes out into the hall and calls them by name after which they go into his office where he gives them a referral slip. When told by Riggi that Adolph should come in and see him, Nick replied that Adolph was outside in the hall and if Riggi wanted him, he should go out and call him in, and he would come. When Nick later told Adolph what Riggi had said,

Adolph replied that there was no reason for him to go in and see Riggi, he would come to the hall and take his chances sitting out there with the rest of the members.

Nick Farmer testified that Riggi also told him that it was an automatic thing, that he knew that he had the okay to take Adolph on his jobs anytime he wanted to. This was within the period 1975-1977. As it stood, as far as Nick Farmer knew, from 1971 through 1977 Adolph Farmer obtained no employment referral from the hall and all work he obtained was through Nick, after he obtained permission from Riggi to let him come out to the job. Unfortunately for Adolph Farmer, Nick did not always have the opportunity to request that Riggi send Adolph to the jobsite because frequently the superintendent or foreman would contact the hall directly and Riggi would not refer Adolph to a job unless it was by special request from Nick. Thus, although Nick Farmer was the steward for the A.M. Gregos job at the Post Office in Elizabeth, for several months he had no opportunity to ask Riggi to have Adolph sent to the job because all referrals were made directly through the hall.

Riggi testified, with regard to 1975, just as he told Nick Farmer, that Adolph could have worked anytime and that this was so because he had given Nick Farmer *carte blanche* to take Adolph Farmer on any job that Nick was on, and to let him work for as many hours as Nick worked, but a little less. For this reason, Riggi stated, he did not feel that he had to call Adolph's name in the hall since whenever Adolph wanted to work, Nick Farmer could have taken him to his job anytime that he was shop steward. Riggi testified that he also told this personally to Adolph Farmer during the 1975-1977 period but Adolph denied this emphatically. Riggi testified that he told this to Adolph Farmer on two occasions but could not remember when or where although it was probably at the hiring hall. He

stated that there were no witnesses. I credit Adolph on this matter and find that although Riggi told Nick that he could take Adolph on any jobs on which he was steward, he never personally advised Adolph of his statement to Nick.

Riggi also testified that Nick Farmer, in 1975, had many opportunities to place Adolph on the A.M. Gregos job because in that year Nick was steward[82] on that job and called Riggi to have him send laborers to the job. Riggi stated that Nick called him up "for some of the people that are on this shop steward's report," referring to the A.M. Gregos Post Office job. He then named certain individuals whom Nick Farmer allegedly asked for by name. Nick Farmer, however, denied requesting these persons. On this issue, I credit Nick Farmer over John Riggi and find that the individuals who worked on the A.M. Gregos job in 1975 were referred out by Riggi directly from the hall rather than through Nick and that Nick did not have an opportunity to request that Adolph be sent to the job.[83] Moreover, Riggi was aware that Nick was in the habit of taking his brother on jobs with him whenever he could. He knew also that Nick was steward on the A.M. Gregos job and that Adolph was sitting out in the hall. If Riggi bore Adolph no animus he would have sent him to Nick's job without waiting for a specific request from Nick.

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82. The record indicates that Nick was steward at A.M. Gregos in June and July 1975.

83. Similarly, Riggi testified that whenever men were requested for the Post Office job, he would notify Nick by phone immediately, thus giving him an opportunity to request that his brother be referred. Nick Farmer emphatically denied that this was the procedure. I credit Nick Farmer and find that he did not specifically request the individuals referred to the A.M. Gregos job and had no opportunity to make the selection as Riggi testified.

Decision

Riggi also testified that he personally referred Adolph Farmer out to one job in 1975, that he could not remember the contractor's name but that when he gave Adolph Farmer the referral slip, he refused the job and told Riggi to send somebody else. Adolph Farmer denied obtaining any referrals from Riggi in 1975. I credit Adolph Farmer.[84]

John Corsentino testified that though he was at the hall himself regularly and noticed Adolph Farmer shaping up

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84. Credibility resolutions, where there are conflicts in the testimony, have most frequently been made against Riggi. Aside from findings made on the basis of inherent probabilities, which are fully discussed in the text, these resolutions are primarily based on my finding that Riggi was a most unpersuasive witness, frequently avoiding giving a direct answer and replying with such phrases as "it could be possible." On the basis of such evasive answers as this and Riggi's general demeanor I have often found against him. Respondent called other witnesses in addition to Riggi to testify concerning possible referrals offered to Adolph Farmer. Thus, three of Respondent's witnesses testified concerning Adolph Farmer's name being called out by Riggi at the Union hall. Timothy Nickles, an individual who served on the Local Union's trial board, that found Abdunafi guilty of slander and decided in 1977 that he should be barred from attending meetings for 2 years, testified that Riggi had called Adolph Farmer's name out in the hall between 2 and 5 times during the period 1975-1977. On these occasions according to Nickles, Adolph Farmer went into Riggi's office and the door was closed. Nickles testified that he did not see Riggi offer Adolph Farmer a referral slip and did not know anything about what occurred in Riggi's office thereafter. Andrew Rose testified that he heard Adolph Farmer's name called out by Riggi 2 or 3 times per year from 1975 through 1976 and that when he was called, Adolph Farmer was always present and would go into Riggi's office. Rose could not testify as to what happened inside Riggi's office once he entered and the door closed behind him. The third witness, William Roach, could not recall having heard Adolph Farmer's name called out at the hall during 1975-1977. In total, I find the evidentiary value of the testimony of these witnesses meager at best, and do not, therefore, rely upon it with regard to the issue of whether or not Adolph Farmer actually received referrals from Riggi during the period 1975-1977.

regularly and sitting out in the hall, he never once referred him to a job within the 3 or 4 years immediately preceding the hearing though he had the authority to do so once Riggi left the hall. When he closed the hall later in the morning when he was not working himself, he would notice that Adolph Farmer was still sitting there.

Union documents, which were stipulated into the record, indicate that Farmer worked for 26 hours in January-February 1976 at the A.M. Gregos Post Office job, then returned to the same job in July of that year and continued to work at that work site through December. *In toto* Adolph Farmer worked for 836-1/2 hours at the A.M. Gregos construction site in 1976.

According to Adolph Farmer, he obtained the 26 hour job, a 2-night job, in January at the A.M. Gregos construction site through Nick Farmer's request from, and the permission of Riggi. Nick told Adolph that he had asked Riggi for the job for him and Riggi had agreed. Thereafter, both Adolph Farmer and Abdunafi reported to the job and worked the 26 hours indicated. Nick Farmer testified that this was the first opportunity he had to put Adolph to work since 1974.

In March or April 1976 Adolph Farmer testified that he was asked by John Corsentino why he was not going to work. Corsentino told Adolph that he was going to lose all of his pension benefits unless he went to work. He observed, "It has been almost 4 years now and you have no credit time?"[85] Adolph

85. Corsentino's approach appears rather disingenuous. After 4 years of watching Adolph Farmer appear each morning to shape up and never once hearing him referred to a job nor referring him to a job himself, Corsentino suddenly professes concern about Adolph Farmer's not working and thereby losing pension benefits. I seriously doubt Corsentino's sincerity on this occasion.

replied, "How do I go to work? You see me at the hall shaping up. Riggi just chose not to send me to work. Corsentino replied, "I don't believe that. I'm going to talk to John tomorrow."[86] Corsentino testified to this conversation by stating that Adolph Farmer informed him that he had not been referred out for 5 years by Riggi. He corroborated Adolph Farmer's testimony closely by stating that he told him that he could not believe his statement. At the same time, Corsentino acknowledged that he had seen Adolph Farmer shaping up and sitting in the hall, day in and day out, and only being referred out once. As noted previously, Corsentino's surprise at Farmer's statement cannot possibly be credited in light of the fact that he was privy to the workings of the referral system, never saw Riggi refer Adolph Farmer to a job and never referred him out himself since 1970. Quite clearly something must have occurred whereby Corsentino, after all these years inexplicably took this sudden interest in Adolph Farmer's welfare. In the absence of any other explanation in the record, I must assume that the Region's investigation of the July 1, 1975 charge may have succeeded in affecting the general attitude of the Union's hierarchy toward Abdunafi's and Adolph Farmer's welfare.

The day after Corsentino's conversation with Adolph Farmer, when Farmer shaped up, Riggi called him into the office and offered him a job. He turned down the job, however, advising Riggi that he had a prior commitment that morning. Though he would have been able to work later that morning or afternoon he did not advise Riggi of this fact. After returning to the hall, Farmer decided that the only reason he was offered the job that morning was because of his conversation with

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86. It is noted that the charge in the instant case was filed in July 1975 and that by April 1976, Respondent may have decided to reconsider its approach toward the problem it was facing as a result of the charge.

Corsentino the previous day. He therefore went back into the office and told Riggi what he had told Corsentino the day before and asked him, "Now, I want you to tell John Corsentino. Have you referred me to a job in 5 years?" Riggi replied, "No."

Corsentino testified that the day after Adolph Farmer told him that Riggi had not referred him out in 5 years, he told Riggi about the conversation. At that point, the phone rang and the call turned out to be a request for a laborer. Riggi thereupon called Adolph Farmer into the office and referred him to the job. According to Corsentino Riggi told Farmer that the job was for 6 months and Farmer turned down the job stating, "Six months is not going to help me." He then went back into the hall. Later, Farmer came back into the office and, according to Corsentino, may have said that Riggi's job offer of that day was the first job Riggi had offered him in 5 years. Corsentino stated that Riggi did not deny Farmer's accusation. Moreover, Corsentino testified that this was the only referral that he had heard Riggi offer to Adolph Farmer in 4 or 5 years.

Adolph Farmer testified that he refused the job offer because of a commitment in New Brunswick to see about another job. When asked if Riggi mentioned how long the job would be that he was being referred to, Farmer at first denied that any length of time was mentioned. Later, when shown his affidavit, Farmer testified that Riggi may have mentioned the length of the job and that it might have been the Battin High School job.

Riggi testified that on this occasion he offered Adolph Farmer the Battin High School job and told him it would last 6 months but that Farmer turned it down with the statement, "Six months will do me no good." From the testimony of Adolph Farmer, Corsentino and Riggi, it would appear that Riggi did,

in fact, offer Farmer a job on the Battin High School project, advising him that it would last for 6 months but that Farmer turned the job down, in part because he had to go to New Brunswick to look into another possible job, but also because the Battin High School job was expected to last only 6 months. Since up to this time Farmer seemed to be anxious to obtain any employment regardless of how short a period the job would last, but suddenly refused this referral because, in part, a 6 month job "would not help him," there seems to have been a complete turnabout in his attitude. The record indicates no apparent reason for the change in his attitude, but something apparently made him decide that he could afford to turn down this referral. If, at about the same time, druing the ninth or tenth month of the Region's investigation of Abdunafi's charges, Riggi should suddenly make his first referral to Adolph Farmer, and Farmer should suddenly decide a 6 month job "would do him no good" whereas previously he was accepting 1 and 2 day jobs whenever he could get them (through his brother), it is more than mere conjecture to arrive at the conclusion that just maybe the Union began to realize, in light of the outstanding charges, that it might be propitious to start offering work referrals to Farmer, while Farmer might assume that the charges filed on his behalf might well be found to be meritorious, and the leverage to be obtained from such a finding might enable him to turn down any but the best job referrals. For lack of a better explanation as to why Riggi should suddenly change his position with regard to offering direct referrals to Farmer, and Farmer should suddenly change his position with regard to accepting such referrals, I am willing to accept the course of the Region's investigation as a possible reason for these changes in position. In any event, whatever the explanation, I find that a geniune referral was made to Adolph Farmer at this time which he rejected.

Decision

The morning after Adolph Farmer turned down the Battin High School job, other individuals were sent out on that job but Riggi did not offer the job to Farmer a second time, nor do I find that he was obligated to insist that Farmer take the job. Once Adolph Farmer rejected the referral, I do not feel that Riggi had any obligation to pursue the matter further, even if Farmer was prepared to accept a second referral to that job, as he testified. It is noteworthy that though present in the hall while referrals were being made to the Battin High School job, Abdunafi was never offered a job there.

In June 1976, Nick Farmer was working as steward on the A.M. Gregos, Post Office job in Elizabeth. He learned and advised Riggi that a foreman was needed on the job and asked if Adolph could have the job. Riggi replied that Nick knew that he could have Adolph on his jobs anytime he wished. Nick replied, "John, do me a favor. Adolph is out in the hall. Call him in and tell him." Riggi thereupon agreed to do so, then called Adolph Farmer in, and sent him to the job. This was the first time since 1970 that Adolph Farmer was given a foreman's job. The job lasted for about a year, until June or July 1977.

Adolph Farmer worked for about one-thousand hours in 1977 on the A.M. Gregos job until July 4, 1977. Thereafter he worked only 3 days. Some time during 1977, Nick Farmer asked Riggi why Adolph Farmer was not working. Riggi replied that Adolph could go to work whenever he wanted to; all he had to do was come in and see him. Riggi did not deny that this conversation took place, and I find that it did.

In 1977, Nick Farmer was the shop steward on a job in Cranford, New Jersey where Malcolm was the general contractor and Sasso and various other contractors were subcontractors. The job started in September or October 1977,

was still in progress at the time of the hearing, and was expected to continue for perhaps 2 or more years. Early at the beginning of the job, Riggi told Nick that if the opportunity should arise, he could take Adolph on the job with him and Nick agreed. Subsequently, Nick got the opportunity to request that Adolph be placed on the Sasso job. Adolph worked for Sasso for 2 days when that job was shut down temporarily by the contractor. When the job opened up again 2 or 3 days later, Sasso did not need Adolph Farmer any longer and that was the end of the job. Since Adolph's layoff at Sasso, there was no further opportunities for Nick to bring Adolph back on the job because Nick was not aware of jobs which opened up for the other contractors on the job.

Sometime after Adolph Farmer's layoff at Sasso, there was a conversation between Riggi and Adolph Farmer which took place in Riggi's office. During this conversation Adolph told Riggi that he did not wish to go back to work for Sasso. Riggi told Farmer that from the Sasso job he could go to work for other subcontractors, then for the general contractor with his brother. This conversation however, took place at a time when there were apparently no openings at the jobsite, and the tenor of the rest of the conversation clearly indicates that Riggi's remarks were not intended as a referral but merely as a suggestion that if Nick Farmer were to come up with a job in the future, Adolph should accept it. This of course was in keeping with recent past practice. At any rate, according to the credited testimony of Nick Farmer, the opportunity to call Adolph to work on the Malcolm job never materialized. Thus, on this occasion there was neither a referral, nor a refusal.

Summary

1. The Exclusive Hiring Hall Arrangement

Decision

The evidence is overwhelming that Respondent-Union operates an exclusive hiring hall whereby anyone who desires employment in the laboring field within its jurisdiction must first obtain a referral slip from Riggi or his assistants or at least get Riggi's permission before going to work. Similarly, Riggi appoints all stewards and all foremen except foremen who are company foremen.

2. Referrals Based Upon Solely Subjective Criteria

The Respondent admits and I have found that the Union, until September 1977, utilized solely subjective criteria in deciding which applicants for employment were to be referred to available jobs. Similarly, I have found that prior to September 1977, no lists, rosters, records or standards of any type were utilized in making referrals. Though any information concerning referrals was kept in the business manager's head, I have concluded that the possibility of Riggi keeping accurate mental records over a period of time is physically impossible. Moreover, I have found that the failure of the Union to maintain proper records of past referrals, current rosters or other standards deprived applicants of the information necessary for them to ascertain whether or not their referral rights were being protected, and therefore violated Section 8(b)(1)(A) of the Act. Similarly, I have found that the practice whereby the business manager has permitted individuals to be hired at jobsites, upon the request of stewards, thus possibly bypassing those applicants who have been waiting longer periods of time for referrals, invidiously undermines the fair and impartial operation of the referral system and is likewise therefore violative of the Act.

With regard to the institution of the September 1977 roster referral system, I have found that its institution does not obviate the necessity for a remedial order. Moreover, the complaint does

not allege that the new roster referral system is unlawful and the evidence in the record is insufficient to enable me to render a decision on this point. Finally, I have been advised that a charge concerning this matter has been filed and it is within the province of General Counsel to determine, through its investigatory procedures, whether complaint should issue or not. I therefore make no findings as to the operation of the hiring hall as of September 1977 and thereafter.

As to the Settlement Agreement, approval of which Respondent urges. I find it unsatisfactory in that it does nothing to make whole the individuals who suffered because of the discriminatory operation of the hiring hall system between January 1975 and the September 1977 institution of the new hiring hall system and possibly thereafter.

3. The Alleged Failure to Refer Wakil Abdunafi

The evidence indicates that Wakil Abdunafi was extremely active within the Union and that his activity took the form of protected concerted activity in which he criticized the local hierarchy's referral system and brought its methods to the attention of the International. Similarly, he charged that Riggi's power and control of the referral system was so all pervasive as to interfere not only with the financial well being of those dependent upon that system but also with the internal workings of the local, its Executive Board, its Trial Board Panels, and with any attempt to correct abuses within. The evidence also indicates that the business manager, Executive Board and various members of the Union hierarchy bore animus against Abdunafi because of these protected activities and took overt action against him in the form of countercharges which resulted in his being suspended from attending union meetings on two occasions for extended periods of time.

Decision

I have also found that following the heavy confrontation between Abdunafi and the Union hierarchy, particularly with Riggi, toward the end of 1970, referrals of Abdunafi to jobs suddenly ceased. In 1971 he received no referrals at all. I have found that the failure of Respondent to refer Abdunafi to any jobs in 1971 was a direct result of his challenging Riggi and the local union's hierarchy concerning their control of the referral system. Similarly, I have found that once Abdunafi began writing letters to the International, to governmental agencies and officials in late 1971 concerning the failure of the local to refer him to jobs, he once again began receiving referrals, albeit referrals not of the same substantial quality as those obtained by local union officials or acquaintances of the business agent in charge of referrals. I have found that this increase in the number of referrals to Abdunafi in 1972 and thereafter was a direct result of his complaints to the International concerning the local's failure to refer him to jobs.

In December 1974, however, Abdunafi filed a charge with the National Labor Relations Board. Thereafter, Abdunafi was not again referred out to any jobs by Riggi. Though this initial charge was dismissed, Abdunafi filed another charge on July 1, 1975 alleging that he had received no referrals in the first 6 months of 1975, and that the Union's referral system was operated in an illegal manner. Throughout the rest of 1975, I have found, Respondent failed and refused to refer Abdunafi to any jobs whatsoever. Respondent's agents, I have found, called out Abdunafi's name in his absence, but I have determined that such an act does not amount to a referral. Beginning in 1976, Riggi did, in fact make certain referrals of jobs to Abdunafi, but these were sporadic and made because of the pressure resulting from the fact that there was an outstanding National Labor Relations Board charge, and not because Respondent had reformed its referral system. In sum, I have found that

Respondent has since 1975, discriminated against Wakil Abdunafi because he engaged in concerted protected activities within the Union and because he filed charges against the Union with the National Labor Relations Board.

4. The Alleged Failure to Refer Adolph Farmer

The evidence indicates that Adolph Farmer, allied with Wakil Abdunafi, was one of the two most vocal adversaries of John Riggi and the Union's leadership since 1970 and that in 1971 he brought charges against Riggi and the Executive Board. The record reflects that in response to the charges filed by Adolph Farmer against the Union leadership, they in turn brought charges against him and he was suspended from attendance at union meetings because of his internal protected activity. I have found that the action taken against Adolph Farmer in retribution for this activity is evidence of animosity, which animosity is supportive of later findings of discriminatory action taken against Farmer. A similar suspension in 1974, I have also determined to have been the result of the Union hierarchy's attempting to prevent Adolph Farmer, in alliance with Abdunafi, from effectively combating the policies of the Union leadership.

In December 1974 when Abdunafi filed his charge with the National Labor Relations Board, Farmer offered evidence in support thereof and I have found that inasmuch as Adolph Farmer was known by Riggi and the Union leadership to have been allied with Abdunafi since 1970, they knew or assumed his complicity with Abdunafi in the filing of the charges. Similarly, Adolph Farmer was identified along with Abdunafi as one of the two individuals who were behind the filing of the July 1, 1975 charge with the National Labor Relations Board and the

Union's animosity was clearly demonstrated against both by criticism of their action by union leaders at various meetings held thereafter.

I have found that prior to Adolph Farmer's joining forces with Wakil Abdunafi to unseat Riggi and undermine his personal control of the referral system, Farmer was one of the favored individuals who was referred to long term jobs and therefore worked steadily. From 1970 until 1976, Farmer no longer received appointments as steward or foreman and worked only 91 hours during the entire year 1971, the period immediately following the initiation of his and Abdunafi's active campaign against Riggi and about the time of his filing of charges against Riggi. I have found that Respondent's explanations as to the reasons for Farmer's loss of opportunity for referral lacking in credibility, and have determined that Riggi's failure to refer Farmer to jobs or appoint him as steward or foreman in 1971 and thereafter, was a direct result of his animosity toward Farmer and the discriminatory motivation borne of Farmer's participation with Abdunafi in anti-Riggi internal protected activity. I have also found that the partial substitution of Nick Farmer as a conduit for some jobs in lieu of the usual direct referral from Riggi did not relieve the Union of its obligation to treat Farmer as it did other applicants for referral who shaped up at the hall. In short, I have found that Adolph Farmer was discriminated against by Riggi because of his protected concerted activity, and was the victim of an illegal referral system. But for the proscription of Section 10(b), I would have found a violation of the Act occurring throughout the period 1971-1974.

In December 1974 after Abdunafi filed the charge with the National Labor Relations Board and Adolph Farmer assisted him and the Board with the investigation, neither of these men

received any work from any source for the entire year of 1975. Though his initial charge was dismissed, Abdunafi's second charge, filed July 1, 1975 remained outstanding, for the most part,[87] right through issuance of complaint in January 1977. Though Adolph Farmer was offered no direct referrals in 1975 and only a few hours work in early 1976, I have found that for one reason or another, not apparent from the record, Riggi did offer Farmer work in March or April which he rejected. Thus, I conclude that the denial of any work to Adolph Farmer in 1975 was the direct result of his support of Abdunafi's filing of the Labor Board charges, and his participation in the investigations which followed as well as the continued animosity engendered by his engaging, since 1970, along with Abdunafi, in the campaign against Riggi and his personal control of the Union hiring hall referral system. I find the failure of the Union to refer Adolph Farmer to work beginning January 1, 1975 was discriminatorily motivated and in violation of the Act. The extent to which Farmer failed to avail himself of opportunities afforded him by referrals in March or April 1976 and possibly thereafter[88] would more properly be the subject of consideration in any forthcoming backpay hearing, assuming one is necessary. However, there is additional evidence in the record that even

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87. The Regional Director refused to proceed on certain allegations contained in the charge.

88. Failure of Abdunafi and Adolph Farmer to sign the roster and participate in the newly divised referral system instituted in September 1977, should also be more properly considered in any future backpay hearing. Since the new referral system is the subject of a recent charge, currently under investigation, the outcome of that investigation may have some bearing on the backpay considerations as well. Therefore, it does not seem appropriate here, to make any determination concerning either the new roster referral system, its administration or the effect on any backpay due discriminatees of their failure to avail themselves or participation in the revised referral system.

after the referral of March or April 1977, Riggi has continued to hold to the position that Adolph Farmer should obtain work through his brother Nick, rather than through the Union hall's referral system as administered through Riggi, a position which I have found in conflict with the law.

Upon the foregoing findings of fact, and on the entire record in the case, I make the following:

Conclusions of Law

1. Building Contractors Association of New Jersey (BCA), and its employer-members, are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 394, Laborers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union maintained and operated on behalf of the employer-members of BCA an exclusive job referral system or arrangement whereby all laborers, to be employed by employer-members of BCA at construction sites located within the Union's jurisdiction, must be referred to them by the Union.

4. By maintaining and operating its exclusive job referral system since on or about January 1, 1975, in such a manner as to select and refer applicants for jobs on the basis of solely subjective criteria without the use of objective criteria or standards, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. By maintaining and operating its exclusive job referral

system since on or about January 1, 1975 in a discriminatory manner, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

6. By discriminatorily failing and refusing to refer Walil Abdunafi and Adolph Farmer to jobs through its exclusive job referral system since on or about January 1, 1975, in retaliation for their having engaged in protected concerted activities including their having filed internal charges against the Union's leadership and charges with the National Labor Board, the Union violated Section 8(b)(1)(A) and (2) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Union has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that the Union unlawfully caused Wakil Abdunafi and Adolph Farmer to be denied referral to work at various member-employers of the Building Contractors Association of New Jersey on various occasions since January 1, 1975, I shall recommend that it make them whole for any loss of earnings suffered as a result of the discrimination against them by payment to them of sums of money equal to that which they normally would have earned as wages from the date of the discrimination against them, as limited by Section 10(b) of the Act, until such time as Respondent-Union properly refers them

to employment, in a nondiscriminatory manner pursuant to the lawful operation of a referral system based on objective criteria or standards, less net earnings during such period. Backpay and interest thereon is to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[89]

I shall, in view of the nature of the unfair labor practices found herein, recommend that Respondent-Union cease and desist from infringing in any manner on the rights of applicants for employment or employees, guaranteed by Section 7 of the Act. A broad order is appropriate in situations such as occurred in the instant case, where Respondent-Union's unfair labor practices are serious in nature and strike at the very heart of those rights which the Act is intended to protect and is therefore recommended. *Local No. 78, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Murray Walter, Inc.)*, 223 NLRB 733 (1976); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4, 1941).

Finally, I shall recommend that Respondent-Union be directed to maintain and operate its exclusive job referral system in a nondiscriminatory manner based on objective criteria or standards, and that a comprehensive recordkeeping system be initiated which will reflect all available job opportunities and referrals. Said records must be intelligible and adequate to full disclosure of the basis upon which referral is made. Records must be sufficiently visible to enable applicants for referral to avail themselves of the opportunity of determining whether or not their referral rights are protected and that referrals are made in a fair and impartial manner.

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89. See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Decision

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[90]

ORDER

Respondent, Local 394, Laborers' International Union of North America, AFL-CIO, its officers, agents, and representative, shall:

1. Cease and desist from:

(a) Maintaining and operating its exclusive job referral system without the use of objective criteria or standards.

(b) Maintaining and operating its exclusive job referral system in a discriminatory manner.

(c) Discriminatorily failing and refusing to refer Wakil Abdunafi and Adolph Farmer to jobs through its exclusive job referral system.

(d) In any other manner restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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90. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Decision

(a) Maintain and operate its exclusive job referral system in a nondiscriminatory manner based upon objective criteria or standards.

(b) Initiate and maintain a comprehensive recordkeeping system which will reflect all available job opportunities and referrals which will fully disclose the basis upon which each referral is made, and make such records available to job applicants to enable them to determine for themselves that their referral rights are protected and that referrals are made in a fair and impartial manner.

(c) Make whole Wakil Abdunafi and Adolph Farmer for any loss of earnings suffered as a result of the discrimination against them by payment to them of sums of money equal to that which they normally would have earned as wages from the date of the discrimination against them, as limited by Section 10(b) of the Act, until such time as Respondent-Union properly refers them to employment in a nondiscriminatory manner pursuant to the lawful operation of a referral system based on objective criteria or standards, less net earnings during such period. Backpay and interest thereon is to be computed in the manner set forth in the section hereof entitled "The Remedy."

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents necessary to analyze and compute the amounts of backpay due Wakil Abdunafi and Adolph Farmer under the terms of this Order.

(e) Post in its main office and hiring hall in Elizabeth,

New Jersey, copies of the attached notice marked "Appendix."[91] Copies of the notice on forms to be provided by the Regional Director for Region 22, after being duly signed by an authorized representative of the Respondent-Union, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members or applicants for referral are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. March 16, 1979

s/ William Jacobs
William Jacobs
Administrative Law Judge

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91. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision

APPENDIX

SEAL
National Labor Relations Board

NOTICE TO
EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
an Agency of the United States Government

After a hearing at which all sides had the opportunity to give evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and Ordered us to post this notice.

WE WILL NOT maintain and operate our exclusive job referral system without the use of objective criteria or standards or in a discriminatory manner.

WE WILL NOT discriminatorily fail or refuse to refer WAKIL ABDUNAFI or ADOLPH FARMER to jobs through our exclusive job referral system.

WE WILL make whole WAKIL ABDUNAFI and ADOLPH FARMER for any loss of earnings suffered as a result of our discrimination against them.

WE WILL maintain and operate our exclusive job referral system in a nondiscriminatory

manner based upon objective criteria or standards.

WE WILL initiate and maintain a comprehensive record keeping system which will reflect all available job opportunities and referrals which will fully disclose the basis upon which each referral is made, and make such records available to job applicants to enable them to determine for themselves that their referral rights are protected and that referrals are made in a fair and impartial manner.

WE WILL NOT in any other manner restrain, or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
(Employer)

Dated _____ By _____
(Representative) (Title)

RELEVANT STATUTES AND ADMINISTRATIVE PROVISIONS

29 U.S.C. §151, *et al.*:

"Unfair Labor Practices

Sec. 8. (a) It shall be unfair labor practice for an employer—

* * *

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees unfirmly required as a condition of acquiring or retaining membership;

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative or his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

* * *

§10(b)

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the changes in that respect, and continuing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceedings and to present testimony. [In any such proceeding the rules of evidence prevailing in courts of law or equity

shall not be controlling.] Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

§10(c)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon [all] the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of employee, back pay may be required of the employer or labor organization, as the case may be reasonable for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and

in deciding such cases, the same regulations and rules of decision shall apply irrespective or whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order, If upon [all] the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of an individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Relevant Statutes and Administrative Provisions

* * *

§203(d)

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and medication services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

National Labor Relations Board
Unfair Labor Practice Manual:

Settlements in General

Section 10124.1:

"*Policy:* It is the policy of the Board and the office of the General Counsel to provide full opportunity to the parties to reach a mutually satisfactory resolution of issues as an alternative to litigation. Settlement of a meritorious case is the most effective means of improved relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action.

The expenditure of funds in connection with the formal status of a case and the effect of the passage of time upon the effectiveness of the

Board in accomplishing the objectives of the Act dictate that the achievement of voluntary remedial action be given high priority and that complete and diligent effort be exerted to achieve the settlement of the greatest possible number of meritorious cases."

Section 10134.2(b):

"*Unilateral settlement:* Where the respondent agrees to take action which will effecuate the purpose of the Act, an agreement may be consummated without the participation of the charging party."

No. 81-88

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner Union violated Section 8(b)(1)(A) and Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by refusing to refer two workers for employment through its exclusive hiring hall because they opposed the Union's leadership and filed unfair labor practice charges against the Union.

2. Whether the Board properly refused to accept a settlement agreement.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 3a-136a) are reported at 247 N.L.R.B. No. 5.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 7, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner ("the Union") operates an exclusive hiring hall in Elizabeth, New Jersey, through which it refers job applicants to area contractors (Pet. App. 12a, 20a-21a). Under the established practice in the area, one cannot obtain a job

as a laborer in the Union's jurisdiction without a referral through the hiring hall (*id.* at 15a-18a). John Riggi, the Union's business manager, is in charge of selecting the job applicants who will receive referrals (*id.* at 12a-21a, 123a). Riggi and his assistants choose among the applicants on the basis of subjective criteria (*id.* at 123a).

Wakil Abdunafi and Adolph Farmer are both longstanding members of the Union (Pet. App. 38a, 106a). Before 1971, both men worked steadily by Riggi's referrals, and on a number of occasions, Riggi selected them to fill openings in the highly desired foreman and steward positions (*id.* at 67a-70a, 106a-109a).[1] During 1971, Abdunafi and Farmer became openly critical of various policies that had been implemented or fostered by Riggi and the other executive officers. In particular, they objected to Riggi's personal control over the hiring hall. At union meetings that year, Abdunafi and Farmer became embroiled in heated clashes with the union leadership over their complaints that the union leaders were abusing their authority (*id.* at 38a-39a). At a union meeting in June 1971, when the two men charged that Riggi had unfairly selected his father and other workers for referrals, Riggi threatened to "hit them in the pocketbook where it hurts" (*id.* at 39a). Thereafter, in 1971, Riggi refused to refer Abdunafi to any jobs, although Abdunafi reported regularly to the hall seeking work (*id.* at 125a). Farmer, who, according to the Union's own records, had worked approximately 1600 hours annually through hiring hall referrals during the previous 18 years, worked only 91 hours in 1971, although he reported to the hall more frequently than anyone else (*id.* at 106a, 109a).

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[1]These jobs are "particularly prized" by the workers because, under the contract between the Union and the area employers' association, stewards are the last to be laid off, and foremen are guaranteed a 40-hour week and are paid at a higher rate (Pet. App. 70a).

Throughout the following years, Abdunafi and Farmer continued their quest for reforms in the Union's referral system and in other policies of the union leadership. They complained to the Union's International office, and filed internal union charges against Riggi and the executive board (Pet. App. 54a, 101a-103a).[2] In September 1972, the Union's executive board filed charges against Farmer, claiming that he had used foul language while presenting his views at a union meeting. After an internal union hearing on these charges, Farmer was found guilty and suspended from all union meetings for five months (*id.* at 102a). In April 1973, Abdunafi successfully challenged the leadership's appointment of a new vice-president as contrary to the Union's constitution. That same month, Riggi filed charges against Abdunafi, claiming that he had used foul language at the meeting where his charges about the vice president's appointment were heard. Thereafter, Abdunafi was found guilty of the alleged misconduct and suspended from all union meetings for a year (*id.* at 47a-50a). In addition, during these years in the mid-1970's, Riggi refused to refer Farmer for employment unless Farmer's brother, Nick Farmer, was working as a steward or foreman on a jobsite and had specifically requested and obtained Riggi's permission to use him (*id.* at 110a). Riggi gave Abdunafi short-term jobs during these years; he was able to obtain jobs longer in duration only through Nick Farmer's specific requests to use Abdunafi on jobsites where he was working (*id.* at 71a-77a).

In December 1974, Abdunafi filed an unfair labor practice charge alleging that the Union was operating its hiring hall in an unlawful manner. Farmer gave an affidavit to the

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[2]Although other union members filed internal charges against the Union, no one except Abdunafi and Farmer filed charges against Riggi personally (Pet. App. 101a).

Board in support of these allegations. Thereafter, throughout 1975, neither Abdunafi nor Farmer received a single referral directly or indirectly from Riggi or his assistants (Pet. App. 113a, 125a). When his initial charges were dismissed, Abdunafi filed new unfair labor practice charges with the Board on July 1, 1975. These are the charges involved in the present case (*id.* at 55a). During 1976, while the charges were pending, Abdunafi obtained only 26 hours of work, although he reported regularly to the hiring hall. Abdunafi was able to work the 26 hours only because Nick Farmer specifically requested that Riggi permit him to use Abdunafi (*id.* at 92a).[3] Likewise, Adolph Farmer did not work in 1976 or 1977, except through the intervention of his brother (*id.* at 126a-129a).

In early 1977, while Abdunafi continued his campaign for reforms in the Union Local, the executive board filed internal charges against him for defamation and slander. After a hearing on these charges, Abdunafi was suspended from all union meetings for the next two years (Pet. App. 59a-60a). For the remainder of 1977, he again received no referrals from Riggi, though he reported regularly to the hall ready, willing, and able to work (*id.* at 92a).

The administrative law judge, whose decision was adopted by the Board, held that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by operating its exclusive hiring hall in a discriminatory manner and "by discriminatorily failing and refusing to refer Wakil Abdunafi and Adolph Farmer to jobs through its exclusive job referral system since on or about January 1, 1975, in retaliation for their having

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[3]Since 1971, when Abdunafi began criticizing the Union's policies, Riggi refused ever again to permit him to work as a steward or foreman (Pet. App. 70a). In March or April 1976, when Nick Farmer advised Riggi that a foreman's job was opening at a site where Farmer was then working, Riggi explained that he would not permit Abdunafi to be foreman because "it would not look good" (*id.* at 100a).

engaged in protected concerted activities including their having filed internal charges against the Union's leadership and charges with the National Labor [Relations] Board" (Pet. App. 130a). In reaching his decision, the administrative law judge considered the repeated clashes between the two men and the union leaders, the actions and statements of the union leaders concerning the men, and the fact that, during the years in question, Abdunafi and Farmer reported regularly to the hall seeking work and were unsuccessful, while other workers, including some who arrived after Abdunafi and Farmer, were repeatedly given referrals (*id.* at 82a, 113a, 124a-129a). The administrative law judge rejected as "an afterthought" the Union's claim that Abdunafi's lack of work could be explained by his late arrivals at the hiring hall. In the judge's words, "whether [Abdunafi] arrived before or after other individuals, the others were referred out before him" (*id.* at 67a). Similarly, the administrative law judge found that the Union's explanations for Farmer's failure to obtain referrals were "lacking in credibility" (*id.* at 127a).

The court of appeals, in an unpublished memorandum decision, sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-2a).

ARGUMENT

1. The Union asserts (Pet. 9-11) that the Board improperly relied on events that were time-barred under the Act in reaching its conclusion that the Union improperly discriminated against Abdunafi and Farmer on the basis of their opposition to the policies of the union leadership.[4] There is no merit to this contention. This Court recognized in *Local*

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[4]Section 10(b) of the Act, 29 U.S.C. 160(b), provides, in pertinent part, that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

Lodge No. 1424, International Association of Machinists v. *NLRB*, 362 U.S. 411 (1960), that "evidence as to events during the barred period" may be "used to illuminate current conduct claimed in itself to be an unfair labor practice." *Id.* at 419-420. Here, the conduct found to constitute unfair labor practices was the Union's treatment of Abdunafi and Farmer with respect to job referrals beginning January 1, 1975, the date that the Section 10(b) period commenced. The administrative law judge found that neither man had been referred to any jobs throughout 1975, even though both reported to the hiring hall more than anyone else. Other workers, by contrast, were referred out to "5, 6, 7 or more jobs in that year" (Pet. App. 79a, 113a). In these circumstances, it was entirely proper for the administrative law judge to consider Abdunafi's and Farmer's prior work history as well as their previous activities in opposing the policies of the union leadership as background to the Union's current failure to refer the men.[5]

Accordingly, the only issue actually raised is whether substantial evidence supports the Board's finding, upheld by the court of appeals. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above (see

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[5]Equally without merit is the Union's assertion (Pet. 10) that it was prejudiced because the Board made findings based on evidence that postdated the complaint. It has long been recognized that "the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' " *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 309 (1959), quoting *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 369 (1940). The Union does not dispute that its conduct toward Abdunafi and Farmer with respect to referrals after the complaint issued was fully litigated at the hearing or that such conduct was related to that alleged in the charge. Moreover, the complaint alleged that the Union had unlawfully refused to refer Abdunafi "since January 1, 1975."

pages 1-5, *supra*), the record amply supports the Board's findings.

2. The Union also contends (Pet. 5-8) that the General Counsel, with the Board's approval (Pet. App. 124a), improperly refused to accept the settlement agreement proposed prior to the unfair labor practice hearing in this matter. This argument is insubstantial. It has long been established that settlement agreements reached with the Board's regional offices are " 'merely preliminary negotiations' in no way binding on the General Counsel" since he alone "is vested with final authority [under the Act] to bind the government by compromise or by settlement." *Trinity Valley Iron & Steel Co.* v. *NLRB*, 410 F. 2d 1161, 1169 (5th Cir. 1969), quoting *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680, 682 (5th Cir. 1959).

Moreover, the General Counsel acted well within his statutory discretion in refusing to accept the proposed agreement. The proposal failed to provide backpay to Abdunafi and Farmer for the Union's unlawful refusal to refer them for employment. To this extent, it failed to vindicate "the public policy which the Board enforces," *i.e.*, to make "workers whole for losses suffered on account of an unfair labor practice." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). Thus, contrary to the Union's claim (Pet. 8), the General Counsel's rejection of the proposed settlement agreement was entirely consistent with public and statutory policy and presents no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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